United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

884

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20871

MAINE CENTRAL RAILROAD COMPANY,
Appellant,

v.

JOHN T. CONNOR, *ET AL.*,
Appellees

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAINE CENTRAL RAILROAD COMPANY
232 St. John Street
Portland, Maine
Plaintiff,

vs.

THE HONORABLE JOHN T. CONNOR
Secretary of Commerce
U. S. Department of Commerce
Washington, D. C.

and

THE HONORABLE EUGENE P. FOLEY
Assistant Secretary of Commerce
and Director of Economic
Development
U. S. Department of Commerce
Washington, D. C.

and

THE HONORABLE THOMAS W. HARVEY
Deputy Administrator
Economic Development Administration
U. S. Department of Commerce
Washington, D. C.
Defendants.

Civil Action No. ____

COMPLAINT FOR DECLARATORY RELIEF

1. The action arises under the Act of August 26, 1965, 79 Stat. 570; U.S.C. Title 42 §3211(11), as hereinafter more fully appears, and under the Act of July 7, 1958, 72 Stat. 349; U.S.C. Title 28 § 2201

2. Plaintiff is a privately owned public utility corporation, which is organized under the laws of the State of Maine and is engaged in the business of transportation by rail in the States of Maine, New Hampshire and Vermont, rendering service to the public at rates or charges subject to regulation by the Interstate Commerce Commission and the Public Utilities Commission of the State of Maine.

3. The Honorable John T. Connor as Secretary of Commerce is charged by the Act of August 25, 1965, 79 Stat. 569; U.S.C. Title 48 § 3201 with the overall administration and supervision of the Economic Development Administration; under the same statute, The Honorable Eugene P. Foley as Assistant Secretary of Commerce and Administrator for Economic Development is to render assistance to the Secretary with respect to the Economic Development Administration; and The Honorable Thomas W. Harvey as Deputy Administrator of the Economic Development Administration directs the operations of the Administration pending the appointment of an Administrator.

4. Effective August 26, 1965, the Economic Development Administration succeeded the Area Redevelopment Administration.

5. Under the Act of August 26, 1965, 79 Stat. 573; U.S.C. Title 42 §3214(d), "all projects for which applications are pending before the Area Redevelopment Administration on August 26, 1965, shall for a period of one year thereafter be eligible for consideration by the Secretary for such assistance under the provisions of this chapter as he may determine to be appropriate."

6. In June 1963, Knox Pier, Inc., a non-profit organization of Rockland, Maine, originally applied to the Area Redevelopment Administration for a loan and grant to construct public facilities at Rockland, Maine; and, under the provisions of the Act of May 1, 1961, 75 Stat. 52, U.S.C. Title 28 §2506, modified its application in July of 1964 to request a loan of about $4,980,000 for the construction of the facilities.

7. The public facilities for which federal financial assistance is sought by Knox Pier, Inc., consist of a deep-water ocean terminal and

associated facilities at Rockland, Maine, to be used primarily as a receiving center for water transportation of grain for the feed milling industry in Maine, which is presently served by Plaintiff's rail transportation system.

8. In view of the serious competitive effect of the proposed facilities to be constructed by Knox Pier, Inc., Plaintiff on September 8, 1964, filed with The Honorable William L. Batt, Jr., Administrator of the Area Redevelopment Administration, a letter in opposition to the loan application filed with the Administration by Knox Pier, Inc., Rockland, Maine.

9. Plaintiff's letter of September 8, 1964, opposed a grant of the requested loan for two reasons: (1) the proposed Rockland pier facility is not economically feasible and the requested loan had no reasonable expectation of repayment; and (2) should the Rockland public facility be constructed with federal funds, the competitive efforts of Knox Pier, Inc., to make it a success would cause serious economic injury to Plaintiff by diverting from it a substantial amount of the grain now carried by rail for the feed milling industry in Maine.

10. Plaintiff also advised the Administrator that since it is a privately owned public utility whose rates are subject to regulation by the Public Utilities Commission of the State of Maine and since the public facility at Rockland would be in direct competition with it for the grain now carried by rail, which represents about 10 percent of its gross revenues, the Area Redevelopment Administration should comply with the requirements of the Act of May 1, 1961, 75 Stat. 52; U.S.C. Title 42 § 2506(d), before it could lawfully render the financial assistance sought by Knox Pier, Inc.

11. Under the referenced statute, the Area Redevelopment Administration is prohibited from rendering financial assistance with respect to any public facilities which would compete with an existing privately owned public utility whose rates are subject to regulation by a State regulatory body unless the State regulatory body makes a determina-

tion that there is a need for an increase in the service which the existing public utility is not able to meet through existing facilities or through an expansion which it agrees to undertake.

12. In a letter dated September 22, 1964, the Area Redevelopment Administration acknowledged receipt of Plaintiff's letter and informed Plaintiff's counsel that "the points made in your paper will be carefully and seriously considered, . . ."

13. The Administration also added that R.W. Booker & Associates, 215 N. 11th Street, St. Louis, Missouri, a private consulting firm, would study the feasibility of the Knox Pier project and that further processing of the application would await the completion of the study.

14. On October 8, 1964, the Bangor and Aroostook Railroad Company filed with the Area Redevelopment Administration a letter of opposition to the Knox Pier application which essentially adopted the position originally set forth by Plaintiff.

15. At the end of January, 1965, Plaintiff learned that R.W. Booker & Associates had completed its feasibility study; on February 16, 1965, apparently in response to Plaintiff's request of the Area Redevelopment Administration, Knox Pier, Inc., forwarded a copy of the report to Plaintiff.

16. The R. W. Booker & Associates' feasibility study was entitled "Contract C-56-65(Neg) Phase I Report Determination of Probable Economic Feasibility Marine Pier & Facilities (Knox Pier, Inc.), Rockland, Maine" and indicated general approval of the Knox Pier, Inc., proposal, stating among other things, that the "dominant factor in making a financial success of the proposed pier and facilities will be the movement of corn for poultry feed."

17. The feasibility study also took note of Plaintiff's letter of opposition and stated that "The present report is not directly involved in appraising the harm to Maine Central, but is very much involved in determining whether the pier project is inherently faulty and unable to pay its own way."

18. On July 28, 1965, Plaintiff learned that the Area Redevelopment Administration had approved a grant of $243,000 to Knox Pier, Inc.

19. By letter dated August 2, 1965, addressed to the Comptroller General of the United States, Plaintiff protested the action of the Area Redevelopment Administration in approving the loan to Knox Pier, Inc., for the reason that no determination had been made by the State regulatory body as required by the Act of May 1, 1961, 75 Stat. 52; U.S.C. Title 42 §2506(d).

20. On August 25, 1965, the Acting Comptroller General replied that his Office was "without authority over the Administration of ARA, except to report to the Congress any undertakings which we feel are not being carried on in accordance with law . . ."

21. Between September 1965 and March 1966, Plaintiff's counsel had a number of informal conversations with various staff members of the Economic Development Administration during which Plaintiff was informed that before actual disbursement of the approved loan of $243,-000, the Administration would decide whether the Knox Pier, Inc., project would compete with Plaintiff.

22. In a letter dated April 20, 1966, The Honorable Thomas W. Harvey, Deputy Administrator of the Economic Development Administration, informed Plaintiff's counsel that it had "determined that the pier is not a public facility which would compete with Maine Central Railroad Company within the meaning of Section 7(d) of the Area Redevelopment Act;" accordingly, the Administration was directing that the $243,000 loan be disbursed to Knox Pier, Inc.

23. Plaintiff alleges that the proposed deep-water ocean terminal and associated facilities to be constructed by Knox Pier, Inc., at Rockland, Maine, will directly compete with Plaintiff by being used as an essential facility for the water transportation of grain, originating in Ohio and trans-shipped by barge from ports such as Norfolk, Virginia, Toledo, Ohio, and Houston, Texas, via the Gulf of Mexico and the At-

lantic Ocean or via the Great Lakes and the St. Lawrence Seaway, to Rockland, Maine, for use in the feed milling industry of Maine -- an industry that at this time receives its grain from the same area of origin by means of Plaintiff's railroad.

24. Plaintiff alleges that it is only by construction of the proposed facilities that water transport of grain through the Port of Rockland will become competitive with Plaintiff's carriage of the same commodity.

25. Plaintiff alleges that in consequence of the competitive effect of the proposed facilities, the Economic Development Administration's decision to disburse $243,000 to Knox Pier, Inc., without the necessary statutory review by the Public Utilities Commission of the State of Maine, constitutes an act beyond the lawful authority of the Administration and is contrary to the specific requirements of the Act of May 1, 1961, 75 Stat. 52; U.S.C. Title 28, §2506.

26. Plaintiff also alleges that the action complained of here constitutes only the first of an inevitable series of disbursements of federal funds for the Knox Pier, Inc., water terminal project, and that the Economic Development Administration will render additional and greater financial assistance in the future in the same unlawful manner.

WHEREFORE, Plaintiff requests the court to adjudge:

(1) That the proposed public facilities to be constructed by Knox Pier, Inc., at Rockland, Maine, would compete with Plaintiff in its rendering of a service to the public at rates or charges subject to regulation by a State regulatory body;

(2) That no financial assistance should be extended to Knox Pier, Inc. under the Act of May 1, 1961, 75 Stat. 52; U.S.C. Title 28 §2506, unless the Public Utilities Commission of the State of Maine first determines that in the area to be served by the proposed Knox Pier, Inc. facilities, there is a need for an increase in the facilities for transporting grain to and in the State of Maine which the Plaintiff is unable to meet through its existing facilities or through an expansion which it agrees to undertake, all pursuant to the referenced Act of May 1, 1961;

(3) That the disbursement of $243,000 to Knox Pier, Inc., under the circumstances described in this Complaint constitutes an unlawful action by the Economic Development Administration and is directly contrary to the Act of May 1, 1961, 75 Stat. 52; U.S.C. Title 28 §2506; and

(4) That before any additional financial assistance is rendered by the Economic Development Administration to Knox Pier, Inc., for its proposed facilities, the Defendants must comply with the Act of May 1, 1961, 75 Stat. 52; U.S.C. Title 28 §2506.

Bernard J. Long
Daniel M. Redmond
Attorneys for Plaintiff

ANSWER

Defendants, by their undersigned attorneys, in answer to plaintiff's complaint for declaratory judgment, admit, deny, and allege as follows:

I.

FIRST DEFENSE

Plaintiff lacks standing to maintain this action.

II.

SECOND DEFENSE

The Court lacks jurisdiction to review the determination of defendants challenged by plaintiff.

III.

THIRD DEFENSE

The complaint fails to state a claim against defendants upon which relief can be granted.

IV.

FOURTH DEFENSE

This action is a suit against the United States to which it has not consented.

V.

FIFTH DEFENSE

The complaint does not present a claim for relief appropriate for declaratory judgment.

VI.

SIXTH DEFENSE

In answer to the specific paragraphs of the complaint, defendants answer as follows:

1. Defendants allege that the jurisdictional allegations contained in paragraph 1 of the complaint do not require an answer.

2. Defendants allege that they lack sufficient knowledge or information on which to form a belief as to the truth of the allegations contained in paragraph 2.

3. - 5. Defendants admit the allegations contained in paragraph 3 through and including paragraph 5 of the complaint.

6. Defendants allege that they lack sufficient knowledge or information upon which to form a belief as to when plaintiff learned of the Knox Pier, Inc., loan application. Defendants deny the remaining allegations in paragraph 6 of the complaint and allege that Knox Pier, Inc., filed its original application for a Section 7 Area Redevelopment Act loan on June 27, 1963. After several amendments to the application, the loan application was approved by the Area Redevelopment on July 29, 1965, for a loan not to exceed $243,000.00.

7. Defendants deny the allegation contained in paragraph 7 of the complaint as stated and allege that the loan was granted to Knox Pier,

Inc., to aid in financing the construction of a barge landing and unloading facilities, grant storage facilities, and an extension or railroad spur to these facilities.

8. - 10. Defendants deny the allegations contained in paragraphs 8 through 10 of the complaint, except that defendants admit that plaintiff wrote a letter dated September 8, 1964, to the Honorable William L. Batt, Administrator of the Area Redevelopment Administration, and respectfully refer the Court to a copy thereof attached hereto as Exhibit A.

11. Defendants allege that the allegations contained in paragraph 11 of the complaint do not require answer since these allegations attempt to paraphrase the provisions of 42 U.S.C. § 2506(d). Defendants respectfully refer the Court to the complete text of the Act for the terms thereof.

12. Defendants deny the allegations contained in paragraph 12, except that defendants admit that 42 U.S.C. 3141(d) applies to the Economic Development Administration, and defendants respectfully refer the Court to the complete text of the Act for the terms thereof.

13. - 14. Defendants admit that a letter dated September 22, 1964, was written by the Area Redevelopment Administration and respectfully refer the Court to the copy thereof attached hereto as Exhibit B.

15. Defendants admit that on October 14, 1964, the Bangor & Aroostook R.R. Company filed a letter with the Area Redevelopment Administration and respectfully refer the Court to a copy thereof attached hereto as Exhibit C.

16. - 18. Defendants allege that they lack sufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in paragraphs 16 through and including paragraph 18 of the complaint, except that defendants admit that R. W. Booker & Associates prepared a report entitled "Phase I Report Determination of Probable Economic Feasibility Marine Pier and Facilities (Knox Pier, Inc.), Rockland, Maine" and respectfully refer the Court to the contents thereof.

19. Defendants allege that they lack sufficient knowledge or information upon which to form a belief as to when plaintiff learned of the action taken by the Area Redevelopment Administration in approving the loan application of Knox Pier, Inc. Defendants allege that a loan to Knox Pier, Inc. for an amount not to exceed $243,000 was approved by the Area Redevelopment Administration on June 29, 1965.

20. Defendants allege that they lack sufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in paragraph 20 of the complaint.

21. Defendants admit that the Acting Comptroller General wrote a letter dated August 25, 1966, to plaintiff and respectfully refer the Court to a copy thereof attached hereto as Exhibit D.

22. Defendants allege that they lack sufficient knowledge or information upon which to form a belief as to the truth of the allegations contained in paragraph 22 of the complaint.

23. Defendants admit that a letter dated April 20, 1966, was written by the Honorable Thomas W. Harvey, Deputy Administrator of the Economic Development Administration, and respectfully refer the Court to a copy thereof attached hereto as Exhibit E.

24. - 27. Defendants deny the allegations contained in paragraphs 24 through 27 of the complaint.

Defendants deny generally and specifically each and every allegation of material fact contained in the complaint, which allegation has not hereinabove been specifically admitted, qualified, or denied.

WHEREFORE, defendants pray that plaintiff be denied any relief and that defendants have judgment for costs.

J. William Doolittle
Acting Assistant Attorney General

* * *

MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Defendants, by their undersigned attorneys, move to dismiss the above action on the grounds that:

(1) Plaintiff lacks standing to maintain this action;

(2) The Court lacks jurisdiction over the subject matter;

(3) Plaintiff has failed to join an indispensable party; and

(4) The Court should decline to exercise jurisdiction under the Declaratory Judgment Act.

In the alternative, defendants move for summary judgment on the grounds that there are no material issues of fact in dispute and defendants are entitled to judgment as a matter of law. In support of defendants' motion for summary judgment, defendants file herewith and make a part hereof the attached affidavits of Mr. James T. Sharkey, Assistant Administrator for Business Loans of the Economic Development Administration and of Mr. Alfred C. Anderson, Chief of Public Works of the Northeastern Area Office of the Economic Development Administration, dated November 16, 1966, and November 10, 1966, respectively. The Court is also respectfully referred to The Memorandum in Support of Defendants' Motion To Dismiss or in the Alternative For Summary Judgment filed herewith.

Respectfully submitted,

Barefoot Sanders
Assistant Attorney General

David G. Bress
United States Attorney

Harland F. Leathers
Attorney, Department of Justice

Leslie A. Nicholson
Attorney, Department of Justice

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE FILED PURSUANT TO LOCAL RULE 9(h)

In this case, defendants have moved to dismiss or, in the alternative, for summary judgment. Defendants contend in support of this alternative motion for summary judgment that the following facts are the material facts in this case as to which there are no genuine issue.

1. The Secretary of Commerce, through the Area Redevelopment Administration, was authorized under the Area Redevelopment Act, inter alia, to make long-term low-cost public facility loans for geographical areas designated as redevelopment areas and therefore eligible for such assistance. The general purpose of such loans was to help in providing more jobs and higher income for people living in areas where jobs are scarce or incomes low. These public facility loans were intended to improve opportunities in redevelopment areas for the successful establishment or expansion of industrial or commercial plants or facilities, and to assist in the creation of additional long-term employment opportunities in such areas so as to relieve continual unemployment.

2. On November 13, 1961, Knox County, Maine, was designated as a redevelopment area under the Area Redevelopment Act. The application of Knox Pier, Inc., a nonprofit corporation in Rockland, Maine, was received by the Area Redevelopment Administration on June 27, 1963. This application was filed pursuant to the public facility loan program authorized by the Area Redevelopment Act, 42 USC 2501, 2506. The pertinent parts of 42 USC 2506 were:

> [T]he Secretary is authorized to make loans to assist in financing the construction, rehabilitation, alteration, expansion, or improvement of public facilities, within a redevelopment area, if he finds that --
>
> (1) the project for which financial assistance is sought will tend to improve the opportunities, in

> the redevelopment area where such project is or will be located, for the successful establishment or expansion of industrial or commercial plants or facilities which will provide more than a temporary alleviation of unemployment or underemployment.

3. This public facility loan application was filed for the purpose of constructing a deep-water marine pier and terminal, which would include docking facilities, warehouses, a ferry landing, grain elevator, roadways, and associated machinery and equipment. The original application was for a 100% loan of $4,349,950.00. In December 1964, an economic study undertaken on behalf of the Area Redevelopment Administration revealed that it would not be feasible for a deep-water pier to be constructed at Rockland, Maine. On February 22, 1965, Knox Pier, Inc. amended its application by eliminating all but one phase of the proposed project, which reduced its request to $443,000.00. On April 14, 1965, the Knox Pier, Inc. application was further amended to request a loan in the amount of $242,250.00 to construct a shallow draft marine barge landing, unloading facilities, grain storage facilities, and an extended railroad spur at Rockland, Knox County, Maine. After further financial analysis, the loan was increased to $243,000.00.

4. Prior to the approval of this loan by the Area Redevelopment Administration, plaintiff submitted a letter in opposition to the granting of the loan. Plaintiff contended in this letter of opposition that the Administrator could not approve Knox Pier's application for a loan since the Maine Public Utilities Commission had not determined that "there is a need for the service for which the loan is sought" and, that such need could not "be met by existing public utility facilities or an expansion thereof." Plaintiff also contended that the proposed Rockland Water Facility was not economically feasible and that the proposed Rockland Water Facility would cause serious economic injury to Maine Central Railroad and the State of Maine. The Area Redevelopment Administration informed plaintiff that these points would be carefully and seriously considered.

5. On July 29, 1965, the Knox Pier, Inc., loan application was approved. By letter of the same date, the Community Facilities Administration (Agency which serviced loans under ARA) was authorized to make a loan offer to the applicant. This letter of authorization to the Community Facilities Administration also informed that agency that Area Redevelopment Administration funds had been reserved and were available for this approved loan. Also by letter of the same date, the Area Redevelopment Administration notified Knox Pier, Inc., that its loan application was approved and that a loan offer would be submitted by the Community Facilities Administration.

6. By letter dated August 2, 1965, the plaintiff contacted the Comptroller General of the United States to protest the action of the Area Redevelopment Administration in approving the loan to Knox Pier on the grounds that no determination had been made by the State regulatory body under 42 U.S.C. 2506(d). The Comptroller's office replied in a letter dated August 25, 1965, that "in view of the broad latitude granted by Section 9 of the AR Act, this office is without authority over the Administrator of ARA, except to report to the Congress any undertakings which we feel are not being carried on in accordance with the law. Thus, our only recourse if we determine that ARA is acting contrary to law is to report the matter to the Congress for whatever action it deems appropriate."

7. By letter dated September 13, 1965, to the Economic Development Administration, 1/ the Community Facilities Administration forwarded a memorandum from its Regional Counsel inquiring whether a determination under section 7(d) of the Area Redevelopment Act, 42 U.S.C. 2506(d), had been made by the Area Redevelopment Administration with respect to the Knox Pier, Inc., loan.

1/ The Economic Development Administration replaced the ARA and is charged with the responsibility of carrying out projects initiated under the AR Act. 42 U.S.C. 3214.

8. The Administrator of the Economic Development Administration, under the authority delegated to him by the Secretary of Commerce (30 F.R. 11892, 11893, September 16, 1965, and Department of Commerce Order 4A of September 1, 1965) determined that the Knox Pier was not a public facility which would compete with Maine Central Railroad Company within the meaning of section 7(d) of the Area Redevelopment Act. On April 20, 1966, the Community Facilities Administration was advised of this determination and authorized to issue a loan agreement and disburse this loan in accordance with the terms and conditions previously authorized by the Area Redevelopment Administration. The offer was made on May 25, 1966, and accepted by vote of the directors of Knox Pier, Inc. on May 27, 1966.

9. The determination that the Knox Pier was not a public facility which would compete with the Maine Central Railroad Company within the meaning of section 7(d) of the ARA was based on the following administrative interpretation of section 7(d).

(a) Congress was concerned in section 7(d) of the Area Redevelopment Act about the use of government funds to establish a public facility which would provide the same service as that presently provided by a privately owned public utility. For example, financial assistance for an electric power system in an area where a privately owned electric power company existed would require a determination by the appropriate state regulatory body that additional electric power service was needed and that the existing privately owned electric company was unable or unwilling to provide such additional service. The same would apply for financial assistance to construct a gas power facility or a proposed rail facility if such facilities presently existed in the area and were privately owned. A determination by the state regulatory body that additional rail, electric, gas, or other services were needed and that an existing privately owned rail, electric, gas, or other company was unable or unwilling to meet this need by an expansion of its facili-

ties would insure that government funds were not being expended unnecessarily.

(b) Congress did not, however, intend to require a determination under section 7(d) by a state agency which regulated an existing privately owned railroad before financial assistance could be extended for the construction of a new highway in that state. Nor would a determination from such a body be required in order to provide financial assistance for improved air transportation in that state. And Congress clearly did not intend that a determination by a state agency which regulates the rates or charges of a privately owned railroad was a prerequisite for financial assistance to construct a pier facility which serves merely as a link between land and water transportation.

10. The above interpretation of section 7(d), and its counterpart 8(d), was consistently followed in handling other applications under the ARA Act for financial assistance for the construction of pier and/or harbor facilities. Our records indicate that financial assistance was extended under the ARA Act for the construction of the two other similar pier and/or harbor projects without requiring a determination by a state agency which regulated the rates or charges of a privately owned railroad.

11. This interpretation of section 7(d) has been continued in regard to section 201(d) of the Public Works and Economic Development Act of 1965, which Act replaced the ARA Act, with section 201(d) being, in pertinent part, identical to section 7(d) of the ARA Act. The Economic Development Administration has consistently followed this interpretation of section 201(d) of the E.D.A. Act of 1965 in extending financial assistance to the three pier or marine projects which are presently under construction.

12. The following ARA projects involve the construction of port and related facilities.

Location, applicant and description	Approval date	Amounts approved
KETCHIKAN ELECTION DISTRICT No. 1, 5(b)(5) Town of Saxman: construct port facility, breakwater, & warehouse	6-62	$1,400,000
CAMDEN AREA, 5(a) City of Camden: construct new port facilities Camden, Arkansas is served by: a. Chicago Rock Island & Pacific Railroad b. Missouri Pacific Railroad c. St. Louis Southwestern Railroad	3-64 2-65	460,021
KNOX PIER: construct dock facilities Rockland, Maine is served by: a. Maine Central Railroad	7-65	243,000

13. The following EDA projects involve the construction of port and related facilities.

Location, applicant and description	Amounts approved
CALIFORNIA Port Entity, Port of Oakland: pier with concrete wharf, warehouses, packing plants and distribution facilities.	$10,125,000

Served by:

a. Atchison, Topeka Santa Fe R. R.

b. Southern Pacific R. R.

c. Western Pacific R. R.

Public Entity, San Diego Unified Port District National City, San Diego: marine terminal. 4,001,000
Served by:

a. Atchison, Topeka, Santa Fe R. R.

b. San Diego R. R.

c. Arizona Eastern R. R.

ALASKA 784,000
Municipality, Seldovia: deck and transit warehouse. Served by:

None

14. As of October 28, 1966, the Knox Pier, Inc., pier was sixty-six percent completed and over fifty-two thousand dollars ($52,000) in government funds have been dispersed to Knox Pier, Inc., to pay for the partial completion of the pier and loading and unloading facilities. In addition to the above amount, Knox Pier, Inc., has paid out $29,411.00 for work and land acquisition and incurred additional obligations of approximately fifty-two thousand dollars in regard to the pier facility.

15. The projected total cost of the Knox Pier, Inc., facility is $297,450; $50,000 of which is to be provided by the Depositors Trust Company of Augusta, Maine; $4,450 of which is to be provided by Knox Pier, Inc.; and $243,000 of which is to be provided by loan agreement between the Economic Development Administration and Knox Pier, Inc.

16. An interruption of the financial assistance to Knox Pier, Inc., will render Knox Pier, Inc., unable to meet requisitions for payment as

they are submitted by the contractors on the pier. Additional private financial assistance is not available. If Knox Pier, Inc., is unable to pay these contractors in accordance with their work progress requisitions they will quit the project and perform no more work thereon.

17. If the job is shut down the contractors are entitled to demobilization costs. If the job is started again after a shutdown, they are entitled to remobilization costs plus they are entitled to renegotiate their contracts with Knox Pier, Inc. Such a renegotiation will result in increased costs to Knox Pier, Inc. in view of the rising costs of construction and in view of the oncoming winter.

18. A job shutdown as contemplated above will increase total project costs. These additional costs cannot be financed through private sources for the reasons stated above. These additional costs cannot be financed in timely fashion by Economic Development Administration because its participation in the financing of construction costs is limited to the amount provided for in the loan agreement with Knox Pier, Inc. The project, therefore, in the event of a shutdown at this time will not be completed.

19. $20,000 was raised by Knox Pier, Inc. pursuant to an offering of debt securities of Knox Pier, Inc. to the citizens of Rockland, Maine. This sum will be lost in the event that the project is not completed.

20. That the next request for a loan advance will be made by Knox Pier, Inc. on the basis of payment requisitions submitted by contractors to it, on or about November 15, 1966.

Respectfully submitted,

Barefoot Sanders
Assistant Attorney General

David G. Bress
United States Attorney

* * *

AFFIDAVIT

I, James T. Sharkey, being first duly sworn according to law, depose and say as follows:

1. I was employed by the Area Redevelopment Administration, U. S. Department of Commerce, as Assistant Administrator for Financial Assistance, from April 25, 1965, to August 26, 1965. In this capacity, I was charged with the responsibility of making recommendations to the Administrator concerning financial assistance under section 7 of the Area Redevelopment Act (42 USC 2501, et seq.).

2. I am now employed by the U. S. Department of Commerce, Economic Development Administration, as Assistant Administrator for Business Loans and have so been employed since August 26, 1965. In this capacity, I am charged with the responsibility of making recommendations to the Administrator concerning financial assistance under section 202 of the Public Works and Economic Development Act of 1965 (42 USC 3201, et seq.). Because the Knox Pier, Inc. loan application was approved under section 7 of the Area Redevelopment Act by the Area Redevelopment Administration, I continued to advise the Administrator of the Economic Development Administration with respect to this project after the expiration of the Area Redevelopment Administration.

3. The Secretary of Commerce, through the Area Redevelopment Administration, was authorized under the Area Redevelopment Act, inter alia, to make long-term low-cost public facility loans for geographical areas designated as redevelopment areas and therefore eligible for such assistance. The general purpose of such loans was to help in providing more jobs and higher income for people living in areas where jobs are scarce or incomes low. These public facility loans were intended to improve opportunitites in redevelopment areas for the successful establishment or expansion of industrial or commercial plants or facilities, and to assist in the creation of additional long-term employment opportunities in such areas so as to relieve continual unemployment.

4. On November 13, 1961, Knox County, Maine, was designated as a redevelopment area under the Area Redevelopment Act. The application of Knox Pier, Inc., a nonprofit corporation in Rockland, Maine, was received by the Area Redevelopment Administration on June 27, 1963. This application was filed pursuant to the public facility loan program authorized by the Area Redevelopment Act, 42 USC 2501, 2506. The pertinent parts of 42 USC 2506 were:

> [T]he Secretary is authorized to make loans to assist in financing the construction, rehabilitation, alteration, expansion, or improvement of public facilities, within a redevelopment area, if he finds that --
>
> (1) the project for which financial assistance is sought will tend to improve the opportunities, in the redevelopment area where such project is or will be located, for the successful establishment or expansion of industrial or commercial plants or facilities which will provide more than a temporary alleviation of unemployment or underemployment.

5. This public facility loan application was filed for the purpose of constructing a deep-water marine pier and terminal, which would include docking facilities, warehouses, a ferry landing, grain elevator, roadways, and associated machinery and equipment. The original application was for a 100% loan of $4,349,950.00. In December 1964, an economic study undertaken on behalf of the Area Redevelopment Administration revealed that it would not be feasible for a deep-water pier to be constructed at Rockland, Maine. On February 22, 1965, Knox Pier, Inc. amended its application by eliminating all but one phase of the proposed project, which reduced its request to $443,000.00. On April 14, 1965, the Knox Pier, Inc. application was further amended to request a loan in the amount of $242,250.00 to construct a shallow draft marine barge landing, unloading facilities, grain storage facilities, and an extended railroad spur at Rockland, Knox County, Maine. After further

financial analysis, the loan was increased to $243,000.00.

6. On July 29, 1965, the Knox Pier, Inc., loan application was approved. By letter of the same date, the Community Facilities Administration was authorized to make a loan offer to the applicant. This letter of authorization to the Community Facilities Administration also informed that agency that Area Redevelopment Administration funds had been reserved and were available for this approved loan. Also by letter of the same date, the Area Redevelopment Administration notified Knox Pier, Inc., that its loan application was approved and that a loan offer would be submitted by the Community Facilities Administration.

7. By letter dated September 13, 1965, to the Economic Development Administration, the Community Facilities Administration forwarded a memorandum from its Regional Counsel inquiring whether a determination under section 7(d) of the Area Redevelopment Act had been made by the Area Redevelopment Administration with respect to the Knox Pier, Inc., loan.

8. The Administrator of the Economic Development Administration, under the authority delegated to him by the Secretary of Commerce (30 F.R. 11892, 11893, September 16, 1965, and Department of Commerce Order 4A of September 1, 1965) determined that the Knox Pier was not a public facility which would compete with Maine Central Railroad Company within the meaning of section 7(d) of the Area Redevelopment Act. On April 20, 1966, the Community Facilities Administration was advised of this determination and authorized to issue a loan agreement and disburse this loan in accordance with the terms and conditions previously authorized by the Area Redevelopment Administration. The offer was made on May 25, 1966, and accepted by vote of the directors of Knox Pier, Inc. on May 27, 1966.

9. The determination that the Knox Pier was not a public facility which would compete with the Maine Central Railroad Company within the meaning of section 7(d) of the ARA was based on the following administration interpretation of section 7(d).

(a.) Congress was concerned in section 7(d) of the Area Redevelopment Act about the use of government funds to establish a public facility which would provide the same service as that presently provided by a privately owned public utility. For example, financial assistance for an electric power system in an area where a privately owned electric power company existed would require a determination by the appropriate state regulatory body that additional electric power service was needed and that the existing privately owned electric company was unable or unwilling to provide such additional service. The same would apply for financial assistance to construct a gas power facility or a proposed rail facility if such facilities presently existed in the area and were privately owned. A determination by the state regulatory body that additional rail, electric, gas, or other services were needed and that an existing privately owned rail, electric, gas, or other company was unable or unwilling to meet this need by an expansion of its facilities would insure that government funds were not being expended unnecessarily.

b. Congress did not, however, intend to require a determination under section 7(d) by a state agency which regulated an existing privately owned railroad before financial assistance could be extended for the construction of a new highway in that state. Nor would a determination from such a body be required in order to provide financial assistance for improved air transportation in that state. And Congress clearly did not intend that a determination by a state agency which regulates the rates or charges of a privately owned railroad was a prerequisite for financial assistance to construct a pier facility which serves merely as a link between land and water transportation.

10. The above interpretation of section 7(d), and its counterpart 8(d), was consistently followed in handling other applications under the ARA Act for financial assistance for the construction of pier and/or harbor facilities. Our records indicate that financial assistance was extended under the ARA Act for the construction of the two other similar pier and/or harbor projects without requiring a determination by a

state agency which regulated the rates or charges of a privately owned railroad.

11. This interpretation of section 7(d) has been continued in regard to section 201(d) of the Public Works and Economic Development Act of 1965, which Act replaced the ARA Act, with section 201(d) being, in pertinent part, identical to section 7(d) of the ARA Act. The Economic Development Administration has consistently followed this interpretation of section 201(d) of the E.D.A. Act of 1965 in extending financial assistance to the three pier or marine projects which are presently under construction.

12. As of October 28, 1966, the Knox Pier Inc. pier was sixty-six percent completed and over fifty-two thousand dollars ($52,000) in government funds had been dispersed to Knox Pier, Inc., to pay for the partial completion of the pier and loading and unloading facilities. In addition to the above amount, Knox Pier, Inc., has paid out $29,411.00 for work and land acquisition and incurred additional obligations of approximately fifty-two thousand dollars in regard to the pier facility.

13. The following ARA projects involve the construction of port and related facilities.

Location, applicant and description	Approval date	Amounts approved
KETCHIKAN ELECTION DISTRICT NO. 1, 5(b)(5) Town of Saxman: construct port facility, breakwater, & warehouse	6-62	$1,400,000
CAMDEN AREA, 5(a) City of Camden: construct new port facilities Camden, Arkansas is served by:	3-64 2-65	460,021

a. Chicago Rock Island & Pacific Railroad

b. Missouri Pacific Railroad

c. St. Louis Southwestern Railroad

KNOX PIER: construct dock facilities	7-65	243,000
Rockland, Maine is served by:		
a. Maine Central Railroad		

14. The following EDA projects involve the construction of port and related facilities.

Location, applicant and description	Amounts approved
CALIFORNIA	$10,125,000
Port Entity, Port of Oakland: pier with concrete wharf, warehouses, packing plants and distribution facilities. Served by:	
a. Atchison, Topeka, Santa Fe R. R.	
b. Southern Pacific R. R.	
c. Western Pacific R. R.	
Public Entity, San Diego Unified Port District National City, San Diego: marine terminal. Served by:	4,001,000

a. Atchison, Topeka, Santa Fe R. R.

b. San Diego R. R.

c. Arizona Eastern R. R.

ALASKA

Municipality, Seldovia: dock and transit warehouse. Served by: 784,000

None

/s/ James T. Sharkey

[Jurat]

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff, by its attorneys, opposes defendants' motion to dismiss and urges the Court to deny it on the following grounds:

(1) Plaintiff has standing to maintain this action;

(2) The Court has jurisdiction over the subject matter;

(3) Plaintiff has not failed to join an indispensable party; and

(4) The Court should exercise jurisdiction under the Declaratory Judgment Act.

In support of its opposition to defendants' motion to dismiss, plaintiff has attached a memorandum in opposition to defendants' motion to dismiss, and the affidavit of Mr. Sumner S. Clark, Vice President of Maine Central Railroad Company, dated December 20, 1966.

Respectfully submitted,

By /s/ Bernard J. Long

December 30, 1966

* * *

PLAINTIFF'S OPPOSITION TO DEFENDANTS' ALTERNATE MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

Plaintiff, by its attorneys, opposes defendants' alternate motion for summary judgment and urges the Court to deny it on the ground that defendants are not entitled to judgment as a matter of law because the Court is not bound by defendants' administrative determination that section 7(c) of the Act of May 1, 1961, 75 Stat. 52; U.S.C. Title 42 §2506(d), the Area Redevelopment Act, did not apply to Knox Pier, Inc., as an applicant for a loan to finance a public facility project in Rockland, Maine.

Plaintiff also cross moves for summary judgment on the grounds that (1) there are no material issues of fact in dispute, and (2) plaintiff is entitled to judgment as a matter of law since defendants' interpretation of the Act of May 1, 1961, 75 Stat. 52; U.S.C. Title 42 §2506(d), the Area Redevelopment Act, as it applied to plaintiff, is clearly erroneous.

In support of its opposition and cross motion, plaintiff has attached a memorandum, the affidavit of Mr. Sumner S. Clark, dated December 28, 1966, and a statement pursuant to Rule 9(h) of this Court.

Respectfully submitted,

By /s/ Bernard J. Long

By /s/ Daniel M. Redmond

By /s/ Bernard J. Long, Jr.

December 30, 1966

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE FILED PURSUANT TO LOCAL RULE 9(h)

Plaintiff has filed a cross motion for summary judgment. In support of its motion plaintiff submits, in accordance with Rule 9(h) of this Court, the following statement of material facts as to which plaintiff contends there is no genuine issue:

1. At the outset plaintiff accepts for purposes of its motion the accuracy of the following facts set forth in defendants' Rule 9(h) statement: Paragraphs 1 through 8; paragraph 9 is accepted only to the extent that it sets forth defendants' reasons for making the statutory interpretation at issue here and does not claim to be a statement of what Congress actually intended; paragraphs 12, 14 and 15 are also accepted.

2. Plaintiff is a privately owned public utility corporation which is organized under the laws of the State of Maine and is engaged in the business of transportation by rail in the States of Maine, New Hampshire and Vermont, rendering service to the public at rates or charges subject to regulation by the Interstate Commerce Commission and the Public Utilities Commission of the State of Maine.

3. In 1964 plaintiff unofficially learned that in June 1963, Knox Pier, Inc., a non-profit organization of Rockland, Maine, originally applied to the Area Redevelopment Administration for a loan and grant to construct public facilities at Rockland, Maine; and, under the provisions of the Act of May 1, 1961, 75 Stat. 52; U.S.C. Title 28 §2506, modified its application in July of 1964 to request a loan of about $4,980,000 for the construction of the facilities.

4. The public facilities for which federal financial assistance is sought by Knox Pier, Inc., consist of a deep-water ocean terminal and associated facilities at Rockland, Maine, to be used primarily as a receiving and transit center for water transportation of grain for the feed

milling industry in Maine, which is now largely served by plaintiff's rail transportation system.

5. The proposed deep-water ocean terminal and associated facilities to be constructed by Knox Pier, Inc. at Rockland, Maine, will directly compete with plaintiff by being used as a facility essential to and making possible the water transportation of grain originating in Ohio and transhipped by barge from ports such as Norfolk, Virginia, Toledo, Ohio, and Houston, Texas, via the Gulf of Mexico and the Atlantic Ocean or via the Great Lakes and the St. Lawrence Seaway, to Rockland, Maine, for use in the feed milling industry of Maine -- an industry that at this time receives practically all of its grain from the same area of origin by means of plaintiff's railroad.

6. It is only by construction of the proposed facilities that water transport of grain through the Port of Rockland will become competitive with plaintiff's carriage of the same commodity, which in 1965 amounted to 18,448 cars of animal and poultry feed and mill products and which, during the first nine months of 1966, amounted to 11,636 such cars; in 1965 approximately 1,900 cars of grain and feed moved by rail to stations on the Rockland Branch, while in the first six months of 1966 about 935 cars moved to such stations.

7. In view of the serious competitive effect of the proposed facilities to be constructed by Knox Pier, Inc., plaintiff on September 8, 1964 filed with The Honorable William L. Batt, Jr., Administrator of the Area Redevelopment Administration, an informal letter in opposition to the Knox Pier, Inc. loan application; under the statute, as interpreted by the Administration, no procedures were provided for aggrieved parties to formally oppose applications, nor, for that matter, were the details of applications available for review by aggrieved parties.

8. Under the Act of May 1, 1961, Stat. 52; U.S.C. Title 42 §2506(d), the Area Redevelopment Administration is prohibited from rendering financial assistance with respect to any public facility which would compete with an existing privately owned public utility whose rates are sub-

ject to regulation by a State regulatory body unless the State regulatory body makes a determination that there is a need for an increase in the service which the existing public utility is not able to meet through existing facilities or through an expansion which it agrees to undertake.

9. In a letter dated September 22, 1964, the Area Redevelopment Administration acknowledged receipt of plaintiff's letter and informed plaintiff's counsel that "the points made in your paper will be carefully and seriously considered, . . ." The Administration also added that R. W. Booker & Associates, 215 N. 11th Street, St. Louis, Missouri, a private consulting firm, would study the feasibility of the Knox Pier project and that further processing of the application would await the completion of the study.

10. On October 14, 1964, the Bangor and Aroostook Railroad Company filed with the Area Redevelopment Administration a letter of opposition to the Knox Pier application which essentially adopted the position originally set forth by plaintiff.

11. At the end of January, 1965, plaintiff learned that R. W. Booker & Associates had completed its feasibility study; on February 16, 1965, apparently in response to plaintiff's request of the Area Redevelopment Administration, Knox Pier, Inc., forwarded a copy of the report to plaintiff. The R. W. Booker & Associates' feasibility study was entitled "Contract C-56-65(neg) Phase I Report Determination of Probable Economic Feasibility Marine Pier & Facilities (Knox Pier, Inc.), Rockland, Maine" and indicated general approval of the Knox Pier, Inc., proposal, stating among other things, that the "dominant factor in making a financial success of the proposed pier and facilities will be the movement of corn for poultry feed."

12. The feasibility study also took note of Plaintiff's letter of opposition and stated that "The present report is not directly involved in appraising the harm to Maine Central, but it is very much involved in determining whether the pier project is inherently faulty and unable to pay its own way."

13. In a letter dated April 20, 1966, The Honorable Thomas W. Harvey, Deputy Administrator of the Economic Development Administration, informed plaintiff's counsel that it had "determined that the pier is not a public facility which would compete with Maine Central Railroad Company within the meaning of Section 7(d) of the Area Redevelopment Act;" accordingly, the Administration was instructing the Community Facilities Administration to proceed with the closing of the loan and the disbursement of the funds.

Respectfully submitted,

/s/ Bernard J. Long

* * *

December 30, 1966

AFFIDAVIT

I, Sumner S. Clark, being duly sworn, depose and state the following:

That I am Vice President of the Maine Central Railroad Company;

That since its beginning in 1964, I have taken an active part in Maine Central Railroad's opposition to the pier project proposed by Knox Pier in Rockland, Maine, which was to be financed by a loan from the Area Redevelopment Administration and is now being supported by the successor agency, the Economic Development Administration;

That I assisted in the preparation of the declaratory judgment action filed by Maine Central Railroad in the United States District Court for the District of Columbia on May 20, 1966, as Civil Action No. 1336-66;

The following statements are, to the best of my knowledge, information and belief, true:

That the public facility for which Federal financial assistance is sought by Knox Pier, Inc. consists of an ocean terminal and associated

facilities at Rockland, Maine, to be used primarily as a receiving center for water-transported grain for the feed milling industry in Maine;

That at the time of the filing of the Complaint and at the present time practically all of the grain coming into the State of Maine for use in the feed industry is transported by rail. In 1965, 18,448 cars of animal and poultry feed and mill products moved over the lines of Maine Central Railroad Company and 11,636 cars of these commodities moved during the first 9 months of 1966;

That during the year 1965 approximately 1900 cars of grain and feed moved by rail to stations on the Rockland Branch, and during the first 6 months of 1966 approximately 935 such cars moved to stations on the Rockland Branch;

That if the Knox Pier, Inc. water terminal facility becomes functional as proposed by its sponsors, a substantial portion of the grain and feed products now moving by rail over the lines of Maine Central Railroad Company will be diverted to other modes of transportation, which will result in severe economic loss to Maine Central Railroad Company;

That the completion of construction and operation of the proposed water terminal at Rockland for the receipt of water-borne grain for use in the animal and poultry feed industry will be highly competitive and detrimental to the financial well-being of Maine Central Railroad Company and, more particularly, may result in lessened service and possible abandonment of the branch line, which is and has been, for some time, a marginal operation;

That the proposed ocean terminal and associated facilities will directly compete with Maine Central Railroad Company by being used as a facility essential to and making possible the water transportation of grain originating in Ohio and at other points in the Midwest and transshipped by barge from inland ports such as Toledo, Ohio, via the several waterways to the ocean and from ports on the Atlantic seaboard, thence to Rockland, Maine;

That the paper industry is the principal shipper located on the lines of Maine Central Railroad Company and requires a great number of high-grade box cars in which to ship their finished products out of the State. Box cars are in short supply. Cars made empty by the receivers of grain and feed products are necessary and ideally suited for use by the paper industry to move its finished products. Without such an available car supply, it would be extremely difficult for Maine Central Railroad Company to find and provide a sufficient number of freight cars to meet the needs of its shippers and, accordingly, it would result in a substantial reduction in its revenues;

That the owners of barges bringing grain to the facilities of Knox Pier, Inc. would be expected to seek outbound Cargo in order to reduce over-all costs of operation and such outbound Cargo would be moved at low rates and thereby attract freight which would otherwise move via Maine Central Railroad Company, all to its economic detriment; and

That all intrastate rates of Maine Central Railroad Company are subject to regulation by the Public Utilities Commission of the State of Maine and that there is a considerable movement of grain and feed products on intrastate rates within the State of Maine.

/s/ Sumner S. Clark

[Jurat]

DEFENDANTS' REPLY AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Statement

This is an action challenging a loan made by defendants to assist in the construction of a pier in Rockland, Maine. The case is before the Court on defendants' Motion to Dismiss, or, In the Alternative, For Summary Judgment and plaintiff's Cross Motion for Summary Judg-

ment. Previously, however, plaintiff sought to stop further disbursal of this loan by defendants pending a final decision by this Court. The Honorable Leonard P. Walsh of this Court denied plaintiff's request in an order dated December 9, 1966.

The following comments constitute defendants' reply to plaintiff's Opposition to Defendants' Motion to Dismiss or For Summary Judgment and defendants' opposition to Plaintiff's Cross Motion for Summary Judgment.

Argument

I

Plaintiff Has Shown No Standing To Maintain This Action

Defendants have cited a long line of cases from the Supreme Court decision in Alabama Power Co. v. Ickes, 302 U.S. 464, 481 (1937), down to the recent decision by this Court in Dickey Clay Manufacturing Co. v. Connor, Civil Action No. 923-66, D.C.D.C., October 4, 1966, which establish plaintiff's lack of standing to maintain this action. (Defendants' Memorandum In Support of Their Motion to Dismiss or, In the Alternative, For Summary Judgment, pp. 6-12.) (Hereinafter cited as Defs. Memo.) Plaintiff has not cited a single case in which a private party has been held to have standing to challenge a Government loan to a third party. Plaintiff's discussion of the standing issue consists of nothing but an attempt to distinguish or avoid the holdings of the cases relied upon defendants. Furthermore, plaintiff's attempt to avoid the holdings of Alabama Power Co. is futile. Plaintiff argues that it seeks only to protect an alleged right to a hearing by the Maine Public Utilities Commission and not to prevent competition by Knox Pier, Inc. (Plaintiff's Memorandum In Opposition to Defendants' Motion to Dismiss, p. 5.) (Hereinafter cited as Memo Opposing Dismissal.) This argument is no different than plaintiffs' argument in Berry v. Housing

and Home Finance Agency, 233 F. Supp. 457 (N.D. N.Y. 1964), aff'd 340 F.2d 939 (2nd Cir. 1965).

In Berry, plaintiffs who were hotel owners contended that they had a legal right "to a complete independent analysis of the local supply of transient housing ***" demonstrating a need for additional units of such housing before new hotels or transient housing could be included in a urban renewal plan. Obviously there, as here, plaintiffs were merely seeking by a different theory to do that which is not allowable — sue to prevent lawful competition. 1/

Plaintiff attempts to avoid the holding of cases cited by defendants on the standing issue, such as the recent decision in Rural Electrification Administration v. Central Louisiana Electric Co., 354 F.2d 859 (5th Cir. 1966), cert. denied 35 L.W. 3121, by arguing that none of these cases involved a provision similar to 42 U.S.C. 2506(d). To the contrary, the REA statute provided in 7 U.S.C. 904 that no loan *** shall be made unless the consent of the State authority having jurisdiction in the premises in first obtained. In the Central Louisiana case above, it was contended that the consent of the State regulatory authority had not been obtained; however, this allegation was held to be insufficient to give standing to the plaintiffs therein.

Plaintiff's failure to cite any controlling authority for this suit is understandable; defendants are not aware 1A/ of any such case.

1/ See also Kansas City Power and Light Co. v. McKay, 225 F.2d 924 (D.C. Circ. 1955).

1A/ Defendants are aware of the case of Northern States Power Co. v. REA, 248 F. Supp. 616 (D. Minn. 1965), cited at page 9 of plaintiff's Memorandum In Opposition to Defendants' Motion to Dismiss. However, the validity of this case is extremely doubtful since it relied on the district court opinion subsequently reversed by the Court of Appeals for the Fifth Circuit in REA v. Central Louisiana Electric Co., supra. The Northern States case is now on appeal to the Eighth Circuit.

II

Plaintiff Has Not Shown That This Court Has Jurisdiction To Review Determinations Made In The Granting Of A Government Loan.

The Court of Appeals for the District of Columbia has held, as have the Courts of Appeals for the Fifth and Second Circuits, that the courts have no jurisdiction to review the validity of actions taken by Government officials in approving Government loans or other financial assistance, absent a specific provision authorizing such judicial review. Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 933 (D.C. Cir. 1955). See also, Rural Electrification Administration v. Central Louisiana Electric Co., 354 F. 2d 859, 866 (5th Cir. 1966); Berry v. Housing and Home Finance Agency, supra.

In fact, this court only recently held that there was no judicial review of the question as to whether the Secretary [of Commerce] has properly complied with those limitations on the making of loans under the EDA Act of 1965, the act which replaced the AR Act. Dickey Clay Manufacturing Co. v. Connor, cited at p. 11 of Defs.' Memo. (Decision by the Honorable Alexander Holtzoff.)

Plaintiff contends that the "sue and be sued" provision of the AR Act gives the court authority to review defendants' actions in approving loans; however, a "sue and be sued" provision does not give this court jurisdiction. For the Kansas City Power, Central Louisiana Electric Co. and the Dickey Clay cases all involved statutes having a "sue and be sued" provision and yet all of these decisions held that the court lacked jurisdiction to review the actions of government officials granting loans.

Plaintiff's reliance on the case of Leedom v. Kyne, 358 U.S. 184 (1958) to support the subject matter jurisdiction of this court is misplaced. The Leedom case involved an NLRB order against plaintiffs

which clearly violated a specific statutory prohibition intended to protect plaintiffs therein. In subsequent cases the Court has been careful to restrict this ruling. See Railway Clerks v. Employees Association, 380 U.S. 650 (1964), and Boire v. Greyhound Corporation, 376 U.S. 473 (1963).

Nor does the Administrative Procedure Act provide jurisdiction for this action. The Court of Appeals for the District of Columbia after holding that persons, such as plaintiff, could not sue under section 10(a) of the APA, went on to note that:

> It may, moreover, be doubted whether the agency here involved (consisting of the making of loans to and contracts with qualified parties, which plaintiffs are not) constitutes agency action within the meaning of section 2(g) of the Act, 5 U.S.C.A. §1001 (g), which this court could review . . . Kansas City Power and Light Co. v. McKey, supra, at 933, N. 15.

Accordingly, this court has no jurisdiction over the subject matter of this action.

III

This Suit Should Not Proceed
Without Knox Pier, Inc.

The law in this circuit is abundantly clear: a suit by a third party, such as this, which seeks to hinder the performance of a contract between a private party and a Government agency cannot proceed without the appearance of the private party. Butler v. Ickes, Secretary of Interior, 89 F.2d 856 (D.C. Circ. 1937), cert. denied 301 U.S. 709; Alaska Freight Lines v. Weeks, Secretary of Commerce, 18 F.R.D. 64 (D.C. D.C. 1955).

Plaintiff's claim that Knox Pier, Inc.'s only interest "is the eventual distribution of funds." This is not true. Knox Pier, Inc. has entered contracts in reliance on its loan agreement with the Government.

An interruption of payments due under these contracts would constitute a breach by Knox Pier, Inc. and would probably cause the failure of the project. (Affidavit of Alfred C. Anderson, dated November 10, 1966)

If plaintiff is seeking ~~a~~ suspension of further loan disbursals by defendants, Knox Pier, Inc. is certainly an indispensable party. If plaintiff does not seek to stop further disbursals then a decision by this court in favor of plaintiff would be merely an illegal advisory opinion, as shown below.

IV

This Court Can Best Exercise Its Discretion By Not Entertaining This Suit

Defendants have pointed out the reasons why this court should decline to proceed with this case without the presence of Knox Pier, Inc., regardless of whether Knox Pier, Inc. is actually an indispensable party. (Defs'. Memo. p. 16)

Apart from this, it should also be noted that the pier, which is the only thing that plaintiff has objected to, at Rockland is already completed with the related grain facilities estimated to be completed by March 31, 1967. (Affidavit of Alfred C. Anderson dated Jan. , 1967) Defendants have disbursed almost two-thirds of the authorized loan ($154,000 of the $243,000) (Affidavit of Alfred C. Anderson, dated January 12, 1967).

Since the pier itself is completed and presumably paid for further proceedings by this court are neither necessary nor proper.

In addition to the Government funds already expended on the pier and the other aspects of this project, more than fifty-four thousand dollars in private loans have been made, probably in reliance on the Government loan. The loss that could result both to the Government and to innocent third persons from the failure of this project should be avoided, if at all possible.

Defendants would also point out that 42 U.S.C. 2511(11) provides that no injunction or similar process either temporary or permanent can be issued against the Secretary in regard to these loan disbursements. The Honorable Leonard P. Walsh presumably recognized this prohibition in an order dated December 9, 1966, denying plaintiff's earlier request to stop further disbursals. This court's lack of authority to enjoin further disbursals to Knox Pier, Inc. creates a strong possibility that the declaratory judgment sought by plaintiff would be only an advisory opinion, not allowable under the law.

V

In Any Event, Defendants' Motion for Summary Judgment Should Be Granted And Plaintiff's Cross Motion Denied.

Defendants have set forth in their earlier memorandum and the affidavit of Mr. James T. Sharkey dated November 16, 1966 and attached thereto the administrative interpretation of 42 U.S.C. 2506(d) under which no determination by the Maine Public Utilities Commission was required for the approval of a loan to Knox Pier, Inc. (Defs'. Memo. pp. 17-21) Despite plaintiff's lack of agreement, this interpretation should be sustained unless it is completely unreasonable or, in other words, arbitrary or capricious. For the Supreme Court has only recently stated that:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Udall v. Tallman, 380 U.S. 1, 16 (1965).

It is certainly not an arbitrary or capricious interpretation [2/] of 42 U.S.C. 2506(d) to conclude, as defendants have done, that Congress intended to have a determination by a state regulatory body only in regard to financial assistance to a public facility which would provide the same service presently provided in an area by a privately owned public utility subject to regulation by such state body. Thus, financial assistance to construct another railroad in Maine would call for a determination by the Maine Public Utilities Commission under 42 U.S.C. 2506(d). This makes sense because the Maine Public Utilities Commission would have jurisdiction over any such new railroad and is probably equipped to determine whether an additional railroad is needed and whether the Maine Central Railroad could meet any such need by expansion. Whereas in this case there has been no showing or suggestion that the Maine Public Utilities Commission has anything to do with the creation or existence of a pier in Rockland, Maine. Furthermore, it is doubtful that the Maine Public Utilities Commission possesses any knowledge or expertise in regard to the overall transportation needs of the Maine economy. Plaintiff's demand that the Maine Public Utilities Commission pass on the need for a pier in Rockland, Maine, highlights another flaw in plaintiff's argument.

2/ The weight to be given defendants' interpretation is even greater than usual here since this interpretation involves a contemporaneous interpretation of the AR Act. Udall v. Tallman, supra, at 16. Plaintiff argues that the interpretation is not contemporaneous because Mr. Sharkey was not employed until after the passage of the AR Act. Plaintiff ignores both realities and Mr. Sharkey's affidavit. For an interpretation of an act within a few years of its passage is certainly contemporaneous and Mr. Sharkey's affidavit only sets forth the administrative interpretation. There is no suggestion that Mr. Sharkey made the interpretation, however, he is certainly qualified to tell the Court what that interpretation was both then and now.

Plaintiff repeatedly complains, that, without a determination by the Maine Public Utilities Commission, there will be no determination by a local agency that this pier project is necessary and beneficial for the economy of Maine. Plaintiff's complaint has no merit, even apart from the impropriety of a decision by the Maine Public Utilities Commission, as discussed above. For under the AR Act, no financial

> "*** assistance shall be extended unless there shall be submitted to and approved by the Secretary an overall program for the economic development of the area and a finding by the State, or any agency, instrumentality, or local political subdivision thereof, that the project for which financial assistance is sought is consistent with such program***"
> 42 U.S.C. 2505(b)(10)

Pursuant to this provision, the Knox Regional Planning Commission (the pier is in Knox County, Maine) approved the Knox Pier project as did the Maine Department of Economic Development. See affidavit of James T. Sharkey dated January 30, 1967, attached hereto. Contrary to plaintiff's contention not only have local officials approved this project but such officials have the overall responsibility for the economic development of the area.

For these and other reasons set forth in defendants' earlier memorandum the court should grant defendants' motion for summary judgment and deny plaintiff's cross motion.

Respectfully submitted,

Barefoot Sanders
Assistant Attorney General

David G. Bress
United States Attorney

Harland F. Leathers

Leslie A. Nicholson
Attorneys, Department of Justice

AFFIDAVIT

STATE OF MAINE)
) ss.:
COUNTY OF CUMBERLAND)

Alfred C. Anderson, being duly sworn, deposes and says:

1. That he is Chief of Public Works of the Northeastern Area Office of the Economic Development Administration of the U. S. Department of Commerce, with offices at 157 High Street, Portland, Maine.

2. That the averments contained in this affidavit are supplementary to those contained in the previous affidavit that he made on the tenth day of November 1966.

3. That, as of this date, the Economic Development Administration has disbursed $154,000 of the $243,000 authorized loan for the construction of a pier and grain handling equipment including a storage silo for Knox Pier, Inc. at Rockland, Maine. Total disbursement is equivalent to 63% of the $243,000 loan.

The disbursement of $154,000 represents 48% funding of the total project cost of $297,500.

Physical completion of the project based upon work in place and material on hand, is estimated at 70%.

/s/ Alfred C. Anderson

[Jurat]

AFFIDAVIT

STATE OF MAINE)
) ss.:
COUNTY OF CUMBERLAND)

Alfred C. Anderson, being duly sworn, deposes and says:

1. That he is Chief of Public Works of the Northeastern Area Office of the Economic Development Administration of the U.S. Depart-

ment of Commerce, with offices at 157 High Street, Portland, Maine.

2. That the averments contained in this affidavit are supplementary to those contained in the previous affidavits that he made on the tenth day of November 1966 and the twelfth day of January, 1967.

3. That Knox Pier, Inc. at Rockland, Maine, consists of two construction contracts.

Contract #1 with Prock Marine Co. for pier construction was completed on 15 December 1966 as compared to scheduled completion date of 5 February 1967.

Contract #2 is with Hough Bros. for silo construction and grain conveyor system for the pier to the silo and to the mill. Construction completion date for this contract is 1 May 1967. Completion date scheduled by the contractor is 31 March 1967.

It is his opinion, taking into consideration already accomplished work, that the remaining mechanical work can be completed in 6 weeks and the electrical work in about 4 weeks concurrent with other work. Allowing for unforeseen delays due to weather and providng the owner, Knox Pier, Inc. can provide grain for testing, there is every assurance that all work and testing can be completed by the contract date of 1 May 1967. An earlier date of 31 March 1967 is possible provided construction management by the applicant and by the engineer continues at the present rate of progress and scheduling.

/s/ Alfred C. Anderson

[Jurat]

AFFIDAVIT

I James T. Sharkey, being first duly sworn according to law, depose and say as follows:

1. I was employed by the Area Redevelopment Administration, U.S. Department of Commerce, as Assistant Administrator for Finan-

cial Assistance, from April 25, 1965, to August 26, 1965. In this capacity, I was charged with the responsibility of making recommendations to the Administrator concerning financial assistance under section 7 of the Area Redevelopment Act (42 USC 2501, et seq.)

2. I am now employed by the U.S. Department of Commerce, Economic Development Administration, as Director, Office of Business Development and have so been employed since August 26, 1965. In this capacity, I am charged with the responsibility of making recommendations to the Assistant Secretary concerning financial assistance under section 202 of the Public Works and Economic Development Act of 1964 (42 USC 3201, et seq.). Because the Knox Pier, Inc. loan application was approved under section 7 of the Area Redevelopment Act by the Area Redevelopment Administration, I continued to advise the Assistant Secretary for Economic Development with respect to this project after the expiration of the Area Redevelopment Administration.

3. Section 14 of the application of Knox Pier, Inc. indicates that approval of this project was given by the Knox Regional Planning Commission and the Department of Economic Development of the state of Maine. Section 14 of the application provides as follows:

14. CERTIFICATE OF APPROVAL — The undersigned certify that they are an agency or instrumentality of the state or political subdivision in which the project proposed in the foregoing request is to be located and are directly concerned with the problems of economic development in said state or subdivision; that they have considered the qualifications of the applicant in the foregoing request and do for the purpose of qualifying with the requirements of the Area Redevelopment Act approve said applicant; that they have carefully considered the project proposed and in accordance with the provisions of the Area Redevelopment Act do hereby find that said project is consistent with the approved overall program for the economic development of the area and that is not prohibited by the laws of the state or local political subdivision in which it is to be located.

Knox Regional Planning Commission
Local Agency

By /s/ Kenneth Wilson
Title Chairman
Date June 14, 1963

Department of Economic Development
State Agency

By /s/ Lloyd K. Allen
Title Commissioner
Date June 14, 1963

/s/ James T. Sharkey
Director, Office of Business Development Economic Development Administration

[Jurat]

ORDER

Defendants having moved to dismiss the above action or, in the alternative, for summary judgment, plaintiff having moved for summary judgment, briefs and affidavits having been filed in support of said motions, argument of counsel having been heard, the Court being fully advised in the premises herein, and the Court having ruled on February 24, 1967, that the motion of defendants for summary judgment will be granted and the cross-motion for summary judgment of plaintiff will be denied, it is hereby

Ordered, Adjudged, and Decreed that:

(1) Plaintiff's motion for summary judgment should be and hereby is denied;

(2) Defendants' motion for summary judgment should be and hereby is granted; and

(3) The complaint and action herein should be and hereby are dismissed.

/s/ Burnita S. Matthews
United States District Judge

Order Entered: March 10th, 1967.

NOTICE OF APPEAL

Plaintiff hereby notes its Appeal in the above entitled action from the judgment of the United States District Court for the District of Columbia, dated March 10, 1967.

/s/ Bernard J. Long
/s/ Daniel M. Redmond
/s/ Bernard J. Long, Jr.
Counsel for Plaintiff

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20871

MAINE CENTRAL RAILROAD COMPANY,
Appellant,

v.

JOHN T. CONNOR, *ET AL.*,
Appellees

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Of Counsel:

Dow, Lohnes and Albertson
600 Munsey Building
Washington, D.C. 20004

BERNARD J. LONG
DANIEL M. REDMOND
BERNARD J. LONG, JR.
Attorneys for Appellant

STATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction of a declaratory judgment action brought against the Secretary of Commerce to declare illegal, a public works loan to a Pier Facility in Rockland Maine, when such loan was authorized by the Secretary without compliance with statutory procedures granting Appellant the right to demonstrate before the Public Utilities Commission of Maine that it could provide the services to be rendered by the proposed facility, either through its existing facilities, or through an expansion which it would apree to undertake.

2. Whether a proposed pier facility which if successful would constitute an essential link in a transportation system carrying the same commodity from the same point of origin to the same destination as is now transported by Appellant and which would cause serious economic consequences to Appellant, including a reduction in the number of its employees and its service in the Rockland, Maine area, would compete with Appellant within the meaning of a statute intended to supply needed public facilities and to stimulate local economies through inter alia, the creation of employment.

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 20,871

MAINE CENTRAL RAILROAD COMPANY,

Appellant,

v.

JOHN T. CONNOR, Et Al.,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by the United States District Court for the District of Columbia.

The Jurisdiction of the United States District Court for the District of Columbia is claimed under the Act of August 26, 1965, 79 Stat. 570, 42 U.S.C. §3211(ii); under the Act of July 7, 1958, 72 Stat. 349, 28 U.S.C. §2201 and under the Act of June 25, 1948, c. 646, 62 Stat. 930, 28 U.S.C. §1331(a). The Jurisdiction of this Court to hear this appeal is claimed on the basis of the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C. §1291.

Statement of the Case

Appellant (plaintiff below), a privately owned public utility corporation organized under the laws of the State of Maine, is engaged in the business of transportation by rail in the States of Maine, New Hampshire and Vermont, rendering service to the public at rates or charges subject to regulation by the Interstate Commerce Commission and the Public Utilities Commission of the State of Maine. (J. A. p. 28).

The Secretary of Commerce, through the Area Redevelopment Administration (ARA), was authorized under the Area Redevelopment Act (AR Act), 42 U.S.C. §2506(d), to make long-term, low-cost loans for public facilities in areas designated as redevelopment areas and therefore eligible for such assistance. These public-facility loans were intended to improve opportunities in redevelopment areas for the successful establishment or expansion of industrial or commercial plants or facilities, and to assist in the creation of additional long-term employment opportunities in such areas. The general purpose was thus the relief of continual unemployment.(J. A. p. 12).

On November 13, 1961, Knox County, Maine, was designated as a redevelopment area under the AR Act. The application of Knox Pier, Inc., a non-profit corporation, in Rockland, Maine, was received by the ARA on June 27, 1963 (J. A. p. 12). This application was filed pursuant to the public facility loan program authorized by the AR Act, 42 U.S.C. 2501, 2506. The pertinent parts of 42 U.S.C. §2506 are:

> "[T]he Secretary is authorized to make loans to assist in financing the construction, rehabilitation, alteration, expansion, or improvement of public facilities, within a redevelopment area, if he finds that -- (1) the project for which financial assistance is sought will tend to improve the opportunities, in the redevelopment area where such project is or will be located, for the successful establishment or expansion of industrial or commercial plants or facilities which will provide more than a temporary alleviation of employment or underemployment."

The Knox Pier public facility loan application was filed for the purpose of constructing a deep-water, marine pier and terminal, which would include docking facilities, warehouses, a ferry landing, grain elevator, roadways and associated machinery and equipment. One of the prime purposes of the initial plan was the project's use as a receiving and transient center for water transportation of grain to be used in the feed-milling industry in Maine, an industry which is now largely served by appellant's rail transportation system. The original application was for a 100 percent loan of $4,349,950. In December 1964, an economic study undertaken by R. W. Booker & Associates, on behalf of the ARA, revealed that it would not be feasible for a deep-water pier to be constructed at Rockland, Maine. On February 22, 1965, Knox Pier, Inc. amended its application by eliminating all but one phase of the proposed project and reducing its request to $443,000. On April 14, 1965, the Knox Pier, Inc. application was further amended to reduce the loan to $242,250.00 for construction of a shallow-draft, marine-barge landing, unloading facilities, grain-storage facilities and an extended railroad spur at Rockland, Knox County, Maine. After further analysis, the loan request was increased to $243,000. (J. A. p. 13).

Under the Act of May 1, 1961, Stat. 52; U.S.C. Title 42, §2506(d), the ARA was prohibited from rendering financial assistance with respect to any public facility that would compete with an existing privately owned public utility whose rates are subject to regulation by a state regulatory body unless the state regulatory body makes a determination that there is a need for an increase in the service which the existing public utility is not able to meet through existing facilities or through an expansion which it agrees to undertake. The proposed facilities to be constructed by Knox Pier, Inc. at Rockland, Maine, will directly compete with appellant by being used as a facility essential to, and making possible, the water transportation of grain originating in places such as Ohio and transshipped by barge from ports such as Norfolk, Virginia, Toledo, Ohio and Houston, Texas, via the Gulf of Mexico and the Atlantic Ocean or via the Great Lakes and the St. Lawrence Seaway to Rockland, Maine, for use in the feed-milling industry of Maine -- an industry that at this time receives practically all of its grain from the same area of origin by means of appellant's railroad. (J. A. p. 6).

It is only by construction of the proposed facilities that water transport of grain through the Port of Rockland will become competitive with appellant's carriage of the same commodity, which in 1965, amounted to 18,448 cars of animal and poultry feed and milk products and which,during the first nine months of 1966, amounted to 11,636 such cars; in 1965 approximately 1,900 cars of grain and feed moved by rail to stations on the Rockland Branch, while in the first six months of 1966 about 935 cars moved to such stations. (J. A. p. 29). The significance of this

carriage is highlighted by the fact that in 1963, carloads in animal and poultry feed and mill products represented 10.3 percent of the entire tonnage carried on appellant's line and 7.5 percent of appellant's freight revenue.

Appellant unofficially learned of the Knox Pier application of June 1963, in 1964. (J. A. p. 28). In view of what it considered the serious competitive effect of the proposed facilities to be constructed at Knox Pier, Inc., appellant on September 8, 1964, filed with the Honorable William L. Batt, Jr., Administrator of the Area Redevelopment Administration, an informal letter in opposition to the Knox Pier, Inc. loan application. Under the statute, as interpreted by the ARA, no procedures were provided for aggrieved parties to formally oppose applications, nor, for that matter, were the details of applications available for review by aggrieved parties. (J. A. p. 29). Among other things, appellant's letter in opposition noted that at the time the Rockland Branch was a marginal operation and that a successful Knox Pier enterprise would make the Rockland Branch unprofitable and alone probably cause its abandonment. The letter of opposition also pointed out that abandonment of the Rockland Branch would result in the discharge of forty-four Maine Central employees and would, directly and indirectly result in a total loss of seventy-three jobs.

In a letter dated September 22, 1964, the ARA acknowledged receipt of appellant's letter and informed appellant's attorneys that "The points made in your paper will be carefully and seriously considered, . . ." The ARA also noted that R. W. Booker and Associates, a private consulting firm, would sutdy the feasibility of the Knox Pier project and that further processing of the application would await the completion of the study.

(J. A. p. 30). At the end of January 1965, appellant learned that R. W. Booker and Associates had completed its feasibility study. On February 16, 1965, apparently in response to appellant's request of the ARA, Knox Pier, Inc. forwarded a copy of the report to appellant. The R. W. Booker and Associates feasibility study was entitled "Contract C-56-65 (Neg) Phase I Report Determination of Probable Economic Feasibility Marine Pier & Facilities (Knox Pier, Inc.), Rockland, Maine", and indicated general approval of the Knox Pier, Inc. proposal, stating among other things that the dominant factor in making a financial success of the proposed pier and facilities will be the movement of corn for poultry feed. (J. A. p. 30). The feasibility study also took note of appellant's letter of opposition and stated that "the present report is not directly involved in appraising the harm to Maine Central, but it is very much involved in determining whether the pier project is inherently faulty and unable to pay its own way." (J. A. p. 30).

On July 29, 1965, the Knox Pier, Inc. loan application was approved. By letter of the same date, the Community Facilities Administration (CFA) (the agency which services loans under ARA) was authorized to make a loan offer to the applicant. The letter of authorization to the CFA also informed that agency that ARA funds had been reserved and were available for this approved loan. Also, by letter of the same date, the ARA notified Knox Pier, Inc. that its loan application was approved and that a loan offer would be submitted by the CFA. (J. A. p. 14).

By letter dated August 2, 1965, appellant wrote to the Comptroller General of the United States to protest the action of the ARA in approving

the Knox Pier loan on the ground that no determination had been made by the state regulatory body as required under 42 U.S.C. §2506(d). The Comptroller's Office replied in a letter dated August 25, 1965, that, "In view of the broad latitude granted by Section 9 of the AR Act, this Office is without authority over the Administrator of ARA, except to report to the Congress any undertakings which we feel are not being carried out in accordance with the law. Thus, our only recourse if we determine that ARA is acting contrary to law is to report the matter to Congress for whatever action it deems appropriate." (J. A. p. 15).

In reaching its determination that Knox Pier was not a public facility which would compete with the Maine Central Railroad Company within the meaning of Section 7(d) of the AR Act, the EDA made the following administrative interpretation upon Section 7(d):

> "(a) Congress was concerned in Section 7(d) of the Area Redevelopment Act about the use of government funds to establish a public facility which would provide the same service as that presently provided by a privately owned public utility. For example, financial assistance for an electric power system in an area where a privately owned electric power company existed would require a determination by the appropriate state regulatory body that additional electric power service was needed and that the existing privately owned electric company was unable or unwilling to provide such additional service. The same would apply for financial assistance to construct a gas power facility or a proposed rail facility if such facilities presently existed in the area and were privately owned. A determination by the state regulatory body that additional rail, electric, gas, or other services were needed and that an existing privately owned rail, electric, gas, or other company was unable or unwilling to meet this need by an expansion of its facilities would insure that government funds were not being expended unnecessarily.

> "(b) Congress, however, did not intend to require a determination under Section 7(d) by a state agency which regulated an existing privately owned railroad before financial assistance could be extended for the construction of a new highway in that state. Nor would a determination from such a body be required in order to provide financial assistance for improved air transportation in that state. And Congress clearly did not intend that a determination by a state agency which regulates the rates or charges of a privately owned railroad was a prerequisite for financial assistance to construct a pier facility which serves merely as a link between land and water transportation." (J. A. p. 15-16).

The records of the ARA indicate that financial assistance was extended under the AR Act for the construction of two other similar pier and/or harbor projects without requiring a determination by a state agency which regulated the rates or charges of a privately owned railroad. However, only one of these facilities was in an area serviced by a railroad. (J. A. p. 16). Under the Economic Development Administration (EDA), this interpretation has been followed in extending financial assistance to three pier or marine projects which are presently under construction. Of these subsequent projects, two of the pertinent areas are serviced by railroads. (J. A. p. 16).

On May 20, 1966, appellant filed a complaint for declaratory relief in the United States District Court for the District of Columbia, Civil Action No. 1336-66. In this action, appellant requested the court to declare that the proposed facilities to be constructed by Knox Pier, Inc. at Rockland, Maine, which would compete with appellant in its rendering of a service to the public at rates or charges subject to regulation by a state regulatory body, should receive no financial assistance until the Public Utilities Commission of the State of Maine first determined that in the area to be served by the proposed Knox Pier, Inc. facilities, there

is a need for an increase in the facilities for transporting grain to and in the State of Maine which appellant is unable to meet through its existing facilities or through an expansion which it agrees to undertake. Appellant also requested the District Court to determine that under the circumstances, the disbursement of $243,000 to Knox Pier, Inc. would constitute an unlawful action by the EDA and would be directly contrary to its statutory authority and that before any additional financial assistance may be rendered by the EDA to Knox Pier, Inc. for its proposed facilities, the appellees must comply with the statutory restriction.

Appellees' answer was filed on September 22, 1966, and on November 20, 1966, appellees filed a motion to dismiss or in the alternative, for summary judgment. In support of its motion to dismiss, appellees alleged that (a) appellant lacked standing to maintain this action; (b) the court lacked jurisdiction over the subject matter; (c) appellant failed to join an indispensable party; and (d) the court should decline to exercise jurisdiction under the declaratory judgment act. As grounds for its motion for summary judgment, appellees alleged that under the consistent administrative interpretation of Section 7(d), no determination by the Maine Public Utilities Commission was required in regard to the Knox Pier application. This determination was based on the reasoning that a water transportation system could not, within the meaning of the AR Act, compete with a rail transportation system.

On December 30, 1966, appellant filed its opposition to appellees' motion to dismiss the complaint and to appellees' motion for summary judgment. At the same time appellant filed a cross motion for summary judgment. On January 31, 1967, appellees filed their reply and opposition to appellant's cross motion for summary judgment.

The matter came on for hearing before the Honorable Bernita Shelton Matthews, United States District Judge for the District of Columbia, on February 17, 1967. By an order dated March 10, 1967, the District Court ruled that appellees' motion for summary judgment would be granted and that appellant's motion for summary judgment would be denied and that the complaint would be dismissed.

Statute Involved

42 U.S.C. §2506 (now 42 U.S.C. §3141)

> (a) Upon the application of any State, or political subdivision thereof, Indian tribe, or private or public nonprofit organization or association representing any redevelopment area or part thereof, the Secretary is authorized to make loans to assist in financing the purchase or development of land for public facility usage, and the construction, rehabilitation, alteration, expansion, or improvement of public facilities, within a redevelopment area, if he finds that --
>
> > (1) the project for which financial assistance is sought will tend to improve the opportunities, in the redevelopment area where such project is or will be located, for the successful establishment or expansion of industrial or commercial plants or facilities which will provide more than a temporary alleviation of unemployment or underemployment in such area; . . . .
>
> (d) No financial assistance shall be extended under this section with respect to any public facility which would compete with an existing privately owned public utility rendering a service to the public at rates or charges subject to regulation by a State regulatory body, unless the State regulatory body determines that in the area to be served by the public facility for which the financial assistance is to be extended there is a need for an increase in such service (taking into consideration reasonably foreseeable future needs) which the existing public utility is not able to meet through its existing facilities or through an expansion which it agrees to undertake.

STATEMENT OF POINTS

(1) The District Court erred in Denying Plaintiff's Motion for Summary Judgment.

(2) The District Court erred in granting Defendants' Motion for Summary Judgment.

(3) The District Court erred in dismissing the Complaint.

Summary of Argument

Appellant is not asserting a right to be free from federally financed competition but, on the other hand, appellant asserts its statutory right to show that it can provide the services to be afforded by Knox Pier, Inc., through its existing facilities or through an expansion which it agrees to undertake. Thus, appellant has the requisite standing to maintain this action. Furthermore, because the interests of Knox Pier, Inc., are fully represented herein and because it is not legally affected by this action, it is not an indispensable party. Accordingly, the District Court had jurisdiction of this action.

Appellees' determination that Knox Pier, Inc., will not compete with appellant is entitled to no weight and is clearly without foundation in fact or in law. This is so because the pier project to be operated by it will be an essential link in a facility which will render a transportation service now rendered by appellant.

ARGUMENT

In granting appellees' motion for summary judgment while denying appellant's motion for summary judgment, the court below did not specify its reasons for the action. As appellees had also filed an alternative motion to dismiss, to which were attached two affidavits concerning matters outside the record, appellant does not know whether or not the court treated this motion as one for summary judgment (FED. R.CIV. P. 12(b)). In consequence, appellant will argue all the legal issues raised in the court below.

As noted, appellees moved to dismiss appellant's suit, or in the alternative, for summary judgment. In their motion to dismiss appellees asserted that (1) appellant lacked standing, (2) the District Court lacked jurisdiction over the subject matter of the suit, (3) appellant failed to join an indispensable party, and (4) the court should decline jurisdiction under the Declaratory Judgment Act.

I. Appellant Has Standing to Maintain This Action

The declared congressional purpose in creating the Area Redevelopment Administration and its successor, the Economic Development Administration, was to improve and enhance economic conditions in various local areas by developing and expanding new and existing facilities and resources, thereby creating jobs and economic opportunities. (See 42 U.S.C. §2501,

now 42 U.S.C. §3121). Congress, however, was also acutely concerned that taxpayers' monies not be wasted by a duplication of existing facilities or services as such duplication would obviously be self-defeating. Accordingly, it enacted into law several provisions intended to prevent duplication. See 42 U.S.C. §2506(d), now §3141(d), and §2507(c), now §3131(e).

In enacting these provisions, Congress was not concerned with competition as such but with the possible duplication of services which such competition entails. As indicated, Congress was also obviously worried that an existing facility or business would have to cut back employment or production by reason of the new facility, thus thwarting the purpose of the Act. Finally, in Section 2506(d), now Section 3141(d), and Section 2507(c), now Section 3131(e), Congress evidenced its desire for an independent examination of the local need for the new service and also of whether the proposed service could be rendered by an existing facility. These particular provisions thus emphasize the congressional desire to avoid waste and recognition that the expansion of an existing facility could accomplish the same economic objective as the construction of a new one.

It is upon this congressional purpose and the unique statutory implementation thereof that appellant rests its argument that it has standing to bring this action. Appellees argued below that the sole cause of action alleged by appellant was a claimed legal right to be free of competition which is financed by the Government, namely, the pier facility of Knox Pier, Inc., at Rockland, Maine. Thus, appellees stated that appellant lacked standing to bring this action. Appellant agrees that a person subjected to injurious competition does not thereby suffer a legal wrong since no one

has a right to be free of lawful competition, even when the competition is unlawfully financed by the Government. See Kansas City Power & Light Co. v. McKay, 96 U.S. App. D.C. 273, 277, 278n.5, 225 F.2d 924, 928, 929n.5, cert. denied, 350 U.S. 884 (1955). One of the reasons for this doctrine is that a contrary "supposition opens a vista of litigation hitherto unrevealed".[1/] Alabama Power Co. v. Ickes, 302 U.S. 464, 481 (1937). However, appellees' reliance on Alabama Power, and its progeny, including the decision of the United States District Court for the District of Columbia in Dickey Clay Mfg. Co. v. Connor, Civil Action No. 923-66, D.D.C. October 4, 1966 was misplaced because of their restrictive view of the purpose of appellant's action.

As stated in its complaint, appellant is a privately owned public utility whose rates or charges are subject to regulation by the Interstate Commerce Commission and by the Public Utilities Commission of the State of Maine. The complaint further alleged that Knox Pier, Inc., is a public facility which would compete with appellant. Contrary to appellees' stated assumption, however, appellant did not assert any right to be relieved of this competition by virtue of the lawsuit below. It is appellant's position

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1/ The cause of the Supreme Court's fear is not present in this suit. Appellant's action is almost sui generis in that it involves a very limited class (privately owned public utilities subject to State regulation) and as equally restricted a possibility of the same question being raised again. Consequently, the Court may treat the case on its merits without fear that a decision favorable to appellant will result in numerous suits being filed againsg governmental efforts to alleviate economic stress. In large measure such a fear was present in Dickey Clay Mfg. Co. v. Connor, Civil Action No. 923-66, D.D.C., October 4, 1966, a case upon which appellees relied below.

that by the fact of this competition, it is entitled to have the Maine Public Utilities Commission determine whether appellant can perform the proposed services with its existing facilities, or through an expansion which it agrees to undertake.

Under the pertinent statute, 42 U.S.C. §2506(d) of the Area Redevelopment Act (AR Act), now 42 U.S.C. §3141(d), appellees are prohibited from making any loan to a public facility which would compete with an existing privately owned public utility whose rates and charges are subject to regulation unless the regulatory body determines:

> "that in the area to be served by the facility for which financial assistance is to be extended there is a need for an increase in such service (taking into consideration reasonably foreseeable future needs) which its existing utility is not able to meet through the existing facilities or through an expansion which it agrees to undertake."

This provision applies only when a regulated public utility is involved. Although there is no legislative history directly in point, the legislative history of the statute as a whole clearly shows that Congress adopted this unusual procedure to promote the purposes of the Act by avoiding a duplication of services and possible consequent economic hardships, such as the creation of unemployment.

The effect, then, of this provision is twofold: it removes from officials in Washington the final determination of whether additional facilities are needed, and it gives jurisdiction to a local regulatory body more qualified to decide the question. More importantly, it permits an existing utility to show that it is capable of rendering the additional service involved in the loan application. This latter point is made

abundantly clear by the requirement that the regulatory body must determine that the utility is not capable of meeting the increased service needs through its existing facilities, or through an expansion which it agrees to undertake. Obviously, it would be incumbent upon appellant to demonstrate that it can meet these needs or that it will expand its facilities to do so; indeed, appellant's evidence would be crucial in making the determination required by the statute.

Appellees relied heavily below on Berry v. Housing & Home Fin. Agency, 233 F. Supp. 457 (N.D.N.Y. 1965), aff'd, 340 F.2d 939 (2d Cir. 1965). This was a suit for a declaratory judgment that an urban renewal project was invalid since it included transient housing units that would compete with hotels. Plaintiffs owned and operated a hotel which was near a redevelopment project. The statute provided that before monies could be expended for hotels or transient housing, the community had to make an independent analysis of the existing supply and, as a result thereof, determine that there was a need for additional units. Plaintiffs contended that this provision bestowed standing upon them as members of the class intended to be protected. The court disagreed. Unlike the present situation, however, plaintiffs in Berry merely contended that Congress had given them a right to be free from competition; they apparently did not argue that the statute conferred a right in hotel owners to have a hearing or to present evidence as to the effect on them of a particular project; nor did they argue that the statute granted them the opportunity to agree to construct the additional housing themselves. Actually, under the statute a complete analysis could be made and the requirement met without plaintiffs' participation; which is obviously not the case here because the statute gives

appellant the opportunity to demonstrate not only that existing facilities are adequate, but that it would, if necessary, agree to expand its facilities to render the services involved in the loan. The effect of this latter provision would appear to be akin to a right of first refusal in the existing utility.

Another case appellees used for support requires comment. In Dickey Clay Mfg. Co. v. Connor, supra, the U. S. District Court for the District of Columbia, dealt with a suit that is only deceptively similar to the present one. It is true that the defendants in both suits were the same, but that is really where the similarity ends. In Dickey, for instance, the plaintiffs sued to prevent a loan to a manufacturing concern that would be in competition with them. They relied on 42 U.S.C. §3212, which prohibited loans:

> ". . . when the result would be to increase the production of goods, materials, or commodities . . . when there is not sufficient demand for such goods, . . . to employ the efficient capacity of existing competitive commercial or industrial enterprises."

Plaintiffs asserted that the authorization of the particular loan at issue violated the provision, which therefore gave them a right to stop the loan.

Upon defendants' motion, Judge Holtzoff dismissed plaintiffs' complaint on the ground that the only right asserted by them was to be protected from competition, and that, consequently, under Alabama Power Co., supra, and similar cases, plaintiffs lacked standing. In analyzing Dickey and the present case, it is essential to keep in mind that in Dickey plaintiffs sought to prevent competition while in the present case appellant sued only to realize its right to have its position with

respect to its ability or agreement to render the service in question heard at the Public Utilities Commission of Maine; it merely seeks an opportunity to exercise its right of first refusal. Furthermore, the statute under which standing was urged in Dickey (42 U.S.C. §3212) obviously is only a guideline for the administration of loans. That it is no more is clear when it and the provision about public utilities (42 U.S.C. §2506(d)) are compared.

In the first place, the Dickey provision is more general than the public utilities section. All the Dickey section says really is that financial assistance should not be extended under certain conditions; it says little more and can be viewed simply as an admonition to the agency administering the loan programs. In the public utilities provision, however, not only is competition enjoined, but a review procedure is expressly set out to evaluate the need for the additional facility. This is more than an administrative guideline: it is a Congressional limitation on the loan-making activity of the agency. Congress, in effect, has said that it will not rely on administrative forebearance to accomplish its intent to protect public utilities, but will, instead, give to designated independent state bodies the right to make an initial determination in the loan process. This is the vital difference between the Dickey case and appellant's suit. And on this difference rests appellant's contention that Dickey and the cases upon which it stands do not control here.

Concluding on this point, appellant wants to make unmistakably clear the cause of action it asserted below. Its action was not to prevent the competition afforded by Knox Pier, Inc., nor did it seek a ruling that

the EDA cannot ultimately make the loan. All it sought is a determination that it is entitled to a hearing at the Public Utilities Commission of Maine, as provided for in 42 U.S.C. §2506(d), and that federal assistance may only be offered Knox Pier, Inc., after the Maine regulatory body makes the determinations required by statute.

II. The Court Below Had Jurisdiction Over the Subject Matter of this Action

As the second basis for their motion to dismiss, appellees urged that the District Court lacks jurisdiction to review a loan grant under the AR Act because all activity associated with loan-making at the agency is committed solely to the discretion of the officials administering the act. What appellees' position really amounts to is a reassertion of their standing argument with the additional contention that the Secretary of Commerce may expend taxpayers' money in violation of the rights given parties by statute with virtual impunity. To accept appellees' theory would effectively eviscerate the Congressional limitation on the implementation of the AR Act that is set forth in 42 U.S.C. §2506(d).

Section 2511(11), now Section 3211(11), of Title 42 of the United States Code provides that the Secretary may be sued in any State Court having general jurisdiction or in any United States District Court, and confers jurisdiction upon the latter to determine such controversies without regard to the amount in controversy. Accordingly, through this statute and 28 U.S.C. §1331(a), the District Court has subject matter jurisdiction of this action. Appellees' objection, however, did not really go to statutory jurisdiction; what they really contended is that the Secretary's action is unreviewable

because the AR Act does not expressly provide a statutory review procedure. Appellees, however, cited no cases below which indicate that in circumstances identical to the present ones, judicial review is precluded; actually, all but one of the cases cited by appellees hold either that the challenged administrative action was committed to agency discretion or that the plaintiff lacked standing.

In Switchmen's Union v. National Mediation Board, 320 U.S. 297 (1943), the Court found that the District Court did not have jurisdiction of an original suit to review an order of the National Mediation Board that all yardmen in the New York Central rail lines constituted an appropriate bargaining unit. Although there was no statutory procedure for judicial review of such Board action, the court noted that:

> "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this court in Texas & New Orleans R. Co. v. Brotherhood of Clerks, 281 U.S. 548, and Virginian R. Co. v. System Federation, 300 U.S. 515. In those cases, it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the 'right' of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose." Id., at 300.

Subsequently, in Leedom v. Kyne, 358 U.S. 184 (1958), the court applied this language where there was no direct judicial review of a NLRB certification under Section 9(b)(1) of the National Labor Relations Act, 29 U.S.C. §159(b)(1), and held, nevertheless, that the District Court had jurisdiction where the Board action challenged was beyond its statutory authority. In so holding, the court stated:

"In Texas & New Orleans R. Co. v. Brotherhood of Railway & S. S. Clerks, 281 U.S. 548, 549, 50 S.Ct. 427, 74 L.Ed. 1034 it was contended that, because no remedy had been expressly given for redress of the congressionally created right in suit, the Act conferred 'merely an abstract right which was not intended to be enforced by legal proceedings.' Id., 281 U.S. at page 558, 50 S.Ct. at page 429. This court rejected that contention. It said: 'While an affirmative declaration of duly contained in a legislative enactment may be of imperfect obligation because not enforceable in terms, a definite statutory prohibition of conduct which would thwart the declared purpose of the legislation cannot be disregarded . . . . If Congress intended that the prohibition, as thus construed, should be enforced, the courts would encounter no difficulty in fulfilling its purpose . . . . The definite prohibition which Congress inserted in the act cannot therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." Id., 281 U.S. at pages 568, 569, 50 S.Ct. at page 433. And compare Virginia R. Co. v. System Federation, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed." Id. at 190.

The Court also distinguished Switchmen's Union as follows:

> "Here, differently from the Switchmen's case, 'absence of jurisdiction of the federal courts' would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is not other means, within their control (American Federation of Labor v. National Labor Relations Board, supra), to protect and enforce that right. And 'the inference [is] strong that Congress intended the statutory provisions governing the general jurisdiction those courts to control.' 320 U.S. at page 300, 64 S.Ct. at page 97. This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers. Cf. Harmon v. Brucker, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503; Stark v. Wickard, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733; American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 23 S.Ct. 33, 47 L.Ed.90."

The Leedom case is squarely in point in the present circumstances. Certainly the facts as presented demonstrate "a sacrifice or obliteration of a right which Congress" has afforded to

appellant as a privately owned public utility within the terms of 42 U.S.C. §2506(d). Appellant had nowhere to go but to court when appellees decided to ignore the statutory requirement of hearing at the state regulatory level. Appellees really sought a decision that Congress wrote into the contested statute a right without substance and therefore unenforceable. As the Supreme Court noted in Leedom, such an inference cannot be "lightly" made, and in this case should not have been made.

Appellees, however, contended that their action was discretionary and thus not subject to review. Under the Administrative Procedure Act, it is clear that agency action committed to agency discretion by law is not reviewable. 5 U.S.C. §701(a)(2). The effect of this provision is that the courts will not review an administrative official's wisdom or good judgment in the exercise of his duties. See Hargett v. Summerfield, 100 U.S. App. D.C. 85, 243 F.2d 29, cert. denied, 353 U.S. 970 (1957). However, it is also clear that where there is no substantial evidence to support an administrative finding, or an error of law is alleged, or there is an abuse of discretion, the administrative action is reviewable. See, e.g., Stark v. Wickard, 321 U.S. 288 (1944); United States ex rel. Rongetti v. Neelly, 207 F.2d 281 (7th Cir. 1953). See generally, 4 Davis, Administrative Law, ¶28.01-30-14 (1958).

In the instant case, it was appellant's contention that appellees made a finding that Knox Pier, Inc. will not compete with appellant without evidence to support it. Furthermore, appellees' motion for summary judgment indicated that they construed the statutory term "competition" as inapplicable to appellant's situation. Accordingly, under common law principles

and under the Administrative Procedure Act, the administrative action challenged is subject to review on the basis that it is without substantial supporting evidence and is an erroneous interpretation of law.

The APA expressly provides that final agency action causing a legal wrong for which there is no adequate remedy is subject to judicial review. 5 U.S.C. §§702, 704. Upon review, the agency action may be held, inter alia, arbitrary, capricious, an abuse of discretion, in excess of statutory authority or without observance of procedure required by law. 5 U.S.C. §706. This Act affords to appellant, which has suffered a legal wrong through the denial of a statutory right, an avenue for the redress of its grievances. Cf. First National Bank of Smithfield, N. C. v. Saxon, 352 F.2d 267 (4th Cir. 1965).

Before closing this particular discussion, appellant must comment on Rural Electrification Administration v. Central Louisiana Elec. Co., 354 F.2d 859 (5th Cir. 1966) cert. denied, 35 L.W. 3121. In that case, which appellees used below, a privately owned electric utility successfully enjoined a loan by the REA to an electric cooperative for construction of competing facilities. The appellate court, however, reversed, basically because of a lack of standing, since the courts do not have the authority to review REA loans. In the present case appellant notes that Congress has expressly given state regulatory bodies the right to review loan applications that fall within a certain category. If it is to have any meaning at all, this highly unusual[2/] provision must have some means of enforcement by

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2/ In no case on standing reviewed by appellant has a similar provision been found. For instance, in all the cases cited below by appellees the provisions at issue amount only to Congressional guidance of agencies.

the class it is designed to protect. Appellees said it cannot be enforced; appellant says that the courts are obligated to enforce it in the proper circumstances.

III. Knox Pier, Inc., Was Not An Indispensable Party.

It was appellees' contention that appellant's action is an attempt to invalidate or hinder the performance of existing financial arrangements between Knox Pier, Inc., and the Secretary of Commerce. Accordingly, they argued that both parties must be joined in this action before any final decree can be rendered, citing Balter v. Ickes, 67 App. D.C. 122, 89 F.2d 856, cert. denied, 301 U.S. 709 (1937), and similar cases. If, in fact, there is a contractual agreement in existence, the record shows, however, that it did not come into existence until after appellant filed its civil action. In Paragraph 8 of their statement of undisputed facts accompanying their motion for summary judgment, appellees stated that "the offer was made on May 25, 1966, and accepted by vote of the directors of Knox Pier, Inc., on May 27, 1966." (J. A. p. 15).

Thus, not only did appellant's action commence before any alleged rights accrued to Knox Pier, Inc., but appellees had notice of appellant's suit prior to their formal offer of assistance to Knox Pier, Inc. That appellees later entered into what they term a contract to do that which appellant had consistently maintained was beyond their authority cannot put them in a better position than they occupied prior to the execution of the so-called contract. Any other result would be tantamount to permitting appellees to profit from their own wrong.

Moreover, as appellant has already made clear, its action was not an attempt to set aside or interfere with any contractual right which may have been created. If appellant ultimately prevails, the result would not be a declaration that no loan to Knox Pier, Inc. may be made, but simply that as a condition precedent to the distribution of any funds, a statutory determination must be made by the proper state regulatory body. A victory for appellant would merely establish that there is one further administrative step prior to the disbursement of funds; it would by no means prevent the disbursement of the funds. This factor alone clearly distinguishes the cases cited by appellees in the District Court.

There are no hard and fast rules which, when applied to every situation, will produce, with computer-like efficiency, a determination that a particular individual is, or is not, an indispensable party. While there are certain principles that are helpful in resolving these issues, "the golden thread separating indispensable from necessary parties is drawn to do equity". 3 Moore, Federal Practice, ¶19.10, at 2164 (1964). Thus, an indispensable party may be defined as one whose interest in the controversy before the court is such that the court cannot render an equitable judgment without having jurisdiction over him. Commercial State Bank v. Gidney, 174 F. Supp. 770 (D.D.C. 1959), aff'd per curiam, 108 U.S. App. D. C. 37, 278 F.2d 871 (1960). The ultimate decision must be the result of an equitable balancing of the possible effect of a judgment upon interests not represented with the effect of leaving the issues between the parties before the court unresolved. See Gauss v. Kirk, 91 U.S. App. D. C. 80, 83, 198 F.2d 83, 85 (1952); 3 Moore, supra ¶19.10, at 2164.

The Federal Rules of Civil Procedure provide certain guidelines for balancing the competing interests involved:

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."
> Fed. R. Civ. P. 19(a).

It is apparent that clause (1) of this rule did not apply to Knox Pier, Inc., because its absence would not prohibit the court from construing the statute involved, and this is really the only relief sought by appellant. Similarly, clause (2)(ii) is inapplicable because Knox Pier, Inc., would not be subject to any obligation. Knox Pier, Inc., must thus be encompassed by clause (2)(i) in order to obtain threshold status as an indispensable party; however, it is clear that this clause is also inapplicable.

The word "interest" as it is used in the rule denotes, "An interest which must be directly affected legally by the adjudication in the case." McArthur v. Rosenbaum Co., 180 F.2d 617, 621 (3rd Cir. 1950). Accord, Goldwyn, Inc. v. United Artists Corp., 113 F.2d 703, 707 (3rd Cir. 1940). However, Knox Pier, Inc., had no such direct interest in the outcome of this action. Its only concern was with the receipt of a loan from the federal government. It certainly could have no interest in whether defendants comply with the requisite statutory standards before assistance is distributed. In

consequence, if the result of appellant's action will merely be a determination of these statutory standards and not a decision that Knox Pier, Inc. cannot obtain the loan it seeks, the latter has no legal interest related to the subject matter of this action which can be prejudiced by its absence. Accord, New England Mut. Life Ins. Co. v. Brandenberg, 11 Fed. R. Serv. ¶196.1, case 5 (S.D.N.Y. 1948) (action by insurer against beneficiary to rescind insurance policy).

Assuming arguendo that Knox Pier, Inc. would be included within the meaning of Rule 19(a), appellant notes that the Rules provide further that:

> "If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Fed. R. Civ. P. 19(b).

Because Knox Pier, Inc. does not transact business in the District of Columbia, it is readily apparent that it could not be made a party to this action. See 12 D.C. Code Ann. §334 (Supp. V 1966); Fed. R. Civ. P. 4(f). Consequently, the court had to weigh the various factors outlined in Rule 19(b), along with other relevant considerations, and determine whether in equity and in good conscience appellant's action should fail.

The first factor suggested by the Rules is the extent of the prejudice which will result to Knox Pier, Inc. and to appellees from a determination of the issues involved in this action. As indicated, the result of such a determination in appellant's favor would merely establish that the appropriate regulatory body, the Public Utilities Commission of Maine, is to determine whether appellant can render the service in question. Although as a practical matter a judgment for appellant might delay further payments, it would in no way preclude the loan but would establish that the Public Utilities Commission is the proper body for determining whether it should be authorized. In fact, upon information and belief, the only portion of the loan which remains unpaid pertains to a portion of the project upon which construction has not been initiated. And, in any event, prejudice resulting to Knox Pier, Inc. is a result of its own negligence in proceeding with the project in face of appellant's action. Indeed, as indicated, this action was filed before appellees' formal offer of assistance was extended to Knox Pier, Inc. It is only at a later PUC hearing, in which it would be a party, that Knox Pier, Inc.'s interests could be legally affected. Thus, it is obvious that whatever effect this action may have on Knox Pier, Inc., it would be secondary at most. With respect to appellees, no prejudice could result because their interests were fully represented, and the action would not give rise to any inconsistent obligation or a multiplicity of suits.

It is also clear that a judgment rendered in the absence of Knox Pier, Inc. would be completely adequate in that it would dispose of all of the issues related to this matter which can be determined by a court. Furthermore, there would be no question as to the effectiveness of the court's

order as arose in Alaska Freight Lines v. Weeks, 18 F.R.D. 64 (D.D.C. 1955), relied on by appellees below.

Furthermore, if the dismissal is upheld, appellant will be left without a forum in which to seek relief. Under 42 U.S.C. §2511(11), now 42 U.S.C. §3211(11), the Secretary may be sued in any Federal District Court and in any State Court of general jurisdiction. However, there is no basis for effective service of process which could confer jurisdiction over appellees upon a Maine court. With respect to the Federal courts, venue would be proper either where the defendant resides, the cause of action arose, or where plaintiff resides. 28 U.S.C. §1391(e). Thus, appellant could sue appellees either in Washington, D. C., or in Maine; yet, as indicated earlier, Knox Pier, Inc., cannot involuntarily be joined as a party in this action. Moreover, it cannot be joined in an action before the United States District Court in Maine because diversity of citizenship, the only basis for federal jurisdiction, would be lacking. Consequently, if Knox Pier, Inc., is deemed an indispensable party, appellant would have no forum in which to assert its rights.

Appellant's position is supported by analogy to a line of cases represented by Pan American Petroleum Corp. v. Udall, 192 F. Supp. 626 (D.D.C. 1961), which was a suit to recover certain compensatory oil royalties paid in escrow and under protest pursuant to an assessment by the Department of the Interior. The royalties were payable to an Indian who owned land adjacent to land upon which plaintiff's oil well was situated. The issue involved was the reasonableness of the assessment. Defendant asserted that the owner of the land to whom the royalties were payable was an indispensable

party to the action. The court did not agree. Recognizing that the landowner's rights would be affected, and that under normal circumstances she would be an indispensable party, the court held that she was not indispensable because the Secretary of the Interior was in a position to take every action necessary to fully protect her legal rights.

In so holding, the court relied on Green v. Brophy, 71 U.S. App. D. C. 299, 110 F.2d 539 (1940) in which this Court recognized an exception to the general rule of indispensability in that a beneficiary need not be joined where the trustee is capable of fully representing his interests. Similarly, in Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) the Supreme Court held that proposed lessees of oil lands need not be joined in a suit against the Secretary of the Interior to restrain him from leasing the lands because they were to be held for the Indians. Also analogous is Rorick v. Board of Comm'rs., 28 F.2d 377 (N.D. Fla. 1928), where the court held that proposed purchasers of a bond issue need not be joined in a suit to declare the issue unconstitutional.

In the instant case, the interest to be protected by appellees is the eventual distribution of funds pursuant to their authorization; as was the situation in the cases cited, this is the only interest that Knox Pier, Inc., could claim. Certainly appellees did not assert that they were not representing their own interests adequately, which were identical with any interest Knox Pier, Inc. might have.

In conclusion, it is apparent that under the two basic tests involved in a determination of whether Knox Pier, Inc., is an indispensable party (1) does it have an interest which will be directly affected by the

adjudication?; (2) will the failure to join it be inconsistent with equity and good conscience?, Knox Pier, Inc., was not an indispensable party.

IV. This Controversy Was Appropriate For Declaratory Relief

Section IV of appellees' motion to dismiss combined at least two points which must be independently discussed. They relied on Heyward v. Public Housing Administration, 94 U.S. App. D. C. 5, 214 F.2d 222 (1954) for the proposition that even if Knox Pier, Inc. is not an indispensable party, its absence required the District Court, in the exercise of its discretion, to dismiss appellant's action. However, as indicated in Section III hereof, an analysis of the pragmatic circumstances involved in this action leads inescapably to the conclusion that in equity and good conscience, Knox Pier, Inc., need not have been joined under Rule 19(b). Under the amended rules, it does not matter what title is given a party; the elements entering into the exercise of the court's discretion are the same. See Moore, Federal Rules Pamphlet, 525 (1966).

Furthermore, the Heyward case is not an authority for dismissing this action. Plaintiffs in Heyward brought suit to enjoin and declare invalid a federal loan to the Savannah, Georgia, Housing Authority on the grounds that the housing to be constructed was to be racially segregated. The case arose prior to the decision of Brown v. Board of Education, 349 U.S. 294 (1955), and the District Court dismissed the complaint upon defendants' motion on the basis of an affidavit that separate but equal facilities were provided. This Court, however, held that because the agency which formulated the challenged policy and which controlled the construction and administration

of the project was not before the court, litigation which seeks to declare invalid contractual arrangements to which it was a party should not proceed in its absence. Although the Court did not expressly decide that the State authority was an indispensable party, its holding was clearly consistent with Balter v. Ickes, supra, and similar cases which are inapplicable to this action.

Moreover, in Heyward, there was no sense of immediacy involved because even if the project were completed, plaintiff's action would still be able to cause the desegregation of the facilities. On the other hand, in the instant case, once the monies have been disbursed and the facility completely constructed, appellant will be without an effective remedy. This consideration leads to the second element raised by appellees: appellant's need for equitable relief is remote or speculative. The cases cited to the District Court by appellees, however, do not sustain their position.

In Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111 (1962), the court held that declaratory relief should not be granted in an action to establish plaintiff's right to print uncopyrighted speeches by defendant. The decision was made on the sole ground that the record was inadequate for the determination of an issue of such public moment. In Eccles v. Peoples Bank, 333 U.S. 426 (1948), the court denied declaratory relief where the possible injurious activity was not immediate, i.e., the action was not ripe for judicial determination. These cases are obviously inapplicable here, for it is clear that once the facility is constructed and all the money disbursed, the injury is an accomplished fact; appellant has been deprived of his statutory rights. Furthermore, this action could be

no more ripe for determination than it is: appellees have disbursed in excess of $154,000.00 and contemplate further disbursements pursuant to an authorization which appellant has consistently asserted to be in violation of its rights.

Appellant asserts that its action presents a timely and concrete question of substantial significance which is appropriate for judicial consideration. See Public Affairs Associates, Inc. v. Rickover, supra., at 114 (Douglas, J. concurring). The District Court's refusal of jurisdiction in this case leaves appellant without any remedy for the redress of the wrong it has suffered and constituted an abuse of the District Court's discretion under a statute which is remedial in nature and is thus to be liberally construed. Aetna Cas. & Sur. Co. v. Quarles, 92 F.2d 321, 325 (4th Cir. 1937).

V. Knox Pier, Inc., Would Compete With Appellant Within The Meaning of 42 U.S.C. §2506(d), Now 42 U.S.C. §3141(d)

Appellees moved the District Court to grant their motion for summary judgment on the ground that they, appellees, have interpreted 42 U.S.C. §2506(d), now 42 U.S.C. §3141(d), to be inapplicable to appellant. As appellees stated:

> "And Congress clearly did not intend that a determination by a state agency which regulates the rates or charges of a privately owned railroad was a prerequisite for financial assistance to construct a pier facility which serves merely as a link between land and water transportation." (J. A. p. 16).

Relying on Power Reactor Devel. Co. v. I.U.E.W., 367 U.S. 396 (1961) and similar cases, appellees asserted that the courts are bound by their interpretation of the statute.

The contentions advanced by appellees involve three principles of statutory construction, all of which are inapplicable. Courts often give great weight to interpretative rules and procedures (1) which embody an interpretation made contemporaneously with the enactment of the statute; or (2) which have been consistently followed over a long period of time; or (3) when the legislature re-enacts a statute, without substantial change, which has previously received a long continued executive construction. See 1 Davis, Administrative Law, §§5.06, 5.07 (1958).

The "contemporaneous interpretation" doctrine is a judicial recognition of the fact that such "expressions of opinion are highly relevant and material evidence of the probable general understanding of the times and of the opinions of the men who probably were active in the drafting of the statute". White v. Winchester Country Club, 315 U.S. 32, 41 (1944). Thus, in F.H.A. v. The Darlington, Inc., 358 U.S. 84 (1959), the interpretation in question, inter alia, was adopted in the year that the statute was passed. In the instant case, however, appellees indicate that the interpretation in question was adopted much later than the enactment of the AR Act in May, 1961. Furthermore, it does not appear that anyone involved in making the interpretation participated in the drafting of the statute in question; indeed his affidavit shows affiant Sharkey was not employed until April of 1965, shortly before the AR Act was superseded by the Public Works and Economic Development Act of 1965. Additionally, the interpretation at issue does not embody the results of any specialized departmental knowledge or experience. See Harrag Co. v. Helvering, 308 U.S.

389, 398 (1940). Plaintiff therefore submits that defendants' interpretation does not qualify as "contemporaneous" either in fact or within the purview of the rule.

The appellees' assertion below that the interpretation involved comes within the rule of Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294 (1933), and similar cases, is equally without foundation. In the cases cited by appellees to the District Court, there had been repeated expressions and applications of the interpretations involved over a number of years. For example, in Udall v. Tallman, 380 U.S. 1 (1965), the Secretary's interpretation of an executive order had often been discussed and made a matter of public record long before plaintiff's application; and because the construction was a reasonable one, it was upheld. Id. at 17-18. In Norwegian Nitrogen Prods. Co., supra, the interpretation was consistently and repeatedly adhered to for some thirty years. In Power Reactor Devel. Co. v. I.U.E.W., supra, the court noted that the interpretation had been appleid in nine instances and had time and time again been brought to the attention of the Joint Committee on Atomic Energy. Similarly, in F.T.C. v. Mandel Bros., Inc., 359 U.S. 385 (1959), the administrative interpretation had been utilized in over one hundred cases.

The District Court in Stark v. Brannan, 82 F. Supp. 614 (D.D.C. 1949), aff'd, 87 U.S. App. D. C. 388, 185 F.2d 871 (1950), aff'd, 342 U.S. 517 (1952), stated that "the doctrine has its principal usefulness in situations involving a continuous uniform administrative construction of a statute over a considerable period". 82 F. Supp. at 618. Certainly the administrative interpretation involved in the present case meets neither of

these tests. Prior to the application of Knox Pier, Inc., there was one loan approved for port facilities in an area served by a railroad. And even in that case it is impossible to tell whether competition with the railroad was involved. To date, there have been only a total of four such loans, including that to Knox Pier, Inc., and all of them have been approved within less than three years. Significantly, there is no indication that the question raised by appellant was presented with respect to any of the other loans, or, for that matter, that any railroad believed that competition was being financed by federal loans. It should also be remembered that appellant's was the first suit to be filed in which anyone has questioned appellees' administrative interpretation. In the circumstances, then, appellees' interpretation hardly qualifies as possessing the longevity and consistently repeated application required by the cases. See, e.g., Mazer v. Stein, 347 U.S. 201, 213 (1954); Social Security Board v. Nierotko, 327 U.S. 358 (1945); Lukens Steel Co. v. Perkins, 70 U.S. App. D. C. 354, 361, 107 F.2d 627, 634 (1939); rev'd on other grounds, 310 U.S. 113 (1940); Edmund P. Coady, 33 T.C. 771 (1960), aff'd per curiam, 289 F.2d 490 (6th Cir. 1961).

Appellees also asserted that since Congress re-enacted Section 2506(d) into the new statute, Section 3141(d), a presumption is established that Congress thus ratified the previous administrative construction. Yet in re-enacting the statute, Congress actually expanded the review requirement by adding public utilities whose rates are subject to regulation by a federal regulatory body, thus indicating its continued concern for regulated public utilities. Moreover, even the cases relied upon below by appellees reflect the necessity for a longstanding and frequently applied administrative interpretation, while in the case at hand there had been at most only two such interpretations when the statute was re-enacted.

The theory underlying the "re-enactment" doctrine is that "Congress when re-enacting a statute is aware of existing regulations and would, therefore, change the wording of a statute if it intended to eliminate the regulations". Interstate Drop Forge Co. v. Commissioner, 326 F.2d 743, 746 (7th Cir. 1964); Accord, 1 Davis, supra, §5.07, at 333-34. Because of the obvious speculation involved, many courts have refused to apply this doctrine, especially when Congress merely failed to disapprove of the administrative action. To say that Congress by re-enactment of a statute approves a detailed administrative interpretation is to defeat the purpose of Congress in giving the administrative burden to the agency. See F. W. Woolworth Co. v. United States, 91 F.2d 973, 976 (2d Cir. 1937), cert. denied, 302 U.S. 768 (1938).

Thus, in applying the "re-enactment" doctrine, "a crucial factor is whether or not Congress, or some part of it, has deliberately decided not to change the administrative interpretation". 1 Davis, supra, §5.07 at 333. In United States v. Calamaro, 354 U.S. 351 (1957), the court held a Treasury Regulation invalid where the statute was re-enacted subsequent to its issuance. In so doing, the court noted that the regulation had been in effect for only three years and that there was:

> "nothing to indicate that it was ever called to the attention of Congress. The re-enactment of §3290 in the 1954 Code was not accompanied by any congressional discussion which throws light on its intended scope. In such circumstances we consider the 1954 re-enactment to be without significance." 354 U.S. at 359.

Similarly, in Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955), an Internal Revenue Code section had been re-enacted without change

subsequent to a Board of Tax Appeals decision that punitive damages were non-taxable. In holding that these amounts constituted income, the court noted that "re-enactment--particularly without the slightest affirmative indication that Congress ever had the . . . decision before it--is an unreliable indicium at best." 348 U.S. at 431. See also Massachusetts Trustees v. United States, 377 U.S. 235, 241 (1964).

This doctrine has been rejected for similar reasons in a number of cases in the federal courts. See, e.g., Interstate Drop Forge Co. v. Commissioner, supra, (Treasury Regulation); United States v. Zions Savings & Loan Ass'n, 313 F.2d 331 (10th Cir. 1963) (Treasury Regulation); Bloomfield Steamship Co. v. Sabine Pilots Ass'n., 262 F.2d 345, 347 (5th Cir. 1959), cert. dismissed, 368 U.S. 802 (1961) (pilotage rates); Sims v. United States, 252 F.2d 434 (4th Cir. 1958), aff'd, 359 U.S. 108 (1959) (IRS revenue ruling); Rothenberg v. United States, 233 F. Supp. 864 (D.Kan. 1964), aff'd, 350 F.2d 319 (10th Cir. 1965) (Treasury Regulation). As the Fourth Circuit held in Mitchell v. Commissioner, 300 F.2d 533 (4th Cir. 1962) the:

> "failure of Congress to change the wording of a statute does not necessarily mean that it has thereby adopted the administrative interpretation. Nothing that has been shown suggests that the Treasury Regulation was even called to the attention of Congress or any of its committees." 300 F.2d at 538.

In light of the foregoing, it is clear that the "re-enactment" doctrine has no application to the instant case. The interpretation here has had neither longstanding existence nor consistent repetition. There is no indication that it has been published or circulated. The Treasury

Regulations in the cases cited above at least appeared in the Federal Register and were thus a matter of public record. Nor was the interpretation made known to Congress prior to the re-enactment of Section 2506(d). In fact, appellant was unaware of the rationale of the determination until appellees' motion for summary judgment was filed. However, as pointed out in Lukens Steel Co. v. Perkins, supra, the re-enactment rule relates to "construction and practice of long standing--revealed by the issuance of regulations, granting of permits and otherwise--made known to Congress and acquiesced in by it". 70 U.S. App. D. C. at 361, 107 F.2d at 627. The appellees' position, on the other hand, is no more than an unpublished intra-departmental determination. It strains credulity to suggest that this is a longstanding and consistent administrative interpretation. By no means can Congress be considered to have unwittingly acquiesced in it.

Besides the foregoing difficulties, there is an additional hurdle which appellees must surmount. The principle whereby great weight is attached to an administrative interpretation of a statute does not apply to an administrative construction involving the administrator's own powers. Accord, Social Security Board v. Nierotko, supra, at 369. Indeed,

> "it would be a strange doctrine that would permit an administrative officer to extend his own powers in doubtful cases by his own interpretation of the statute. It would be a clear case of lifting one's self by one's own bootstraps." Stark v. Brannan, 82 F. Supp. at 618.

However, this is exactly what appellees have attempted to accomplish. Congress has restricted their power to grant loans when regulated public utilities would be affected are augmenting the power by eliminating the congressional restriction.

Assuming that appellees' determination would be accorded respect under the foregoing principles, such an administrative interpretation will be given weight only where the statute contains an ambiguous command, and where the interpretation is a reasonable one which is supported by the statute. See, e.g., Koshland v. Helvering, 298 U.S. 441, 446-7(1936); Edmund P. Coady, supra. In the last analysis, it is "the duty of the courts to construe the acts of Congress, even if such construction differs with long accepted administrative policy." Louisiana Pub. Serv. Comm'n, v. S.E.C., 235 F.2d 167, 172 (5th Cir. 1956), rev'd on other grounds, 353 U.S. 368 (1957). Accord, Mid Continent Petroleum Corp. v. NLRB, 204 F.2d 613, 621-22 (6th Cir.) cert. denied, 346 U.S. 856 (1953). In the instant case, however, appellees have acted in contravention of the clear congressional policy, and in the face of an unambiguous statutory command.

As previously indicated, the declared congressional purpose in creating the Area Redevelopment Administration and its successor, the Economic Development Administration, was to improve and enhance economic conditions in various local areas by developing and expanding new and existing facilities and resources, thereby creating jobs and economic opportunities. (See 42 U.S.S. §2501, now 42 U.S.S. §3121.) Congress was acutely concerned, however, that taxpayers' monies not be wasted by a duplication which would obviously be self-defeating. Accordingly, it enacted into law several provisions intended to prevent duplication. See 42 U.S.S. §2506(d), now §3141(d), and §2507(c), now §3131(e).

In enacting these provisions, Congress was concerned with the possible duplication of services which such competition entails. Congress

was also obviously worried that an existing facility or business would have to cut back employment or production by reason of the new facility, thus causing unemployment and thwarting the purpose of the Act. Finally, in Section 2506(d), now Section 3141(d), and Section 2507(c), now Section 3131(e), Congress evidenced its desire for an independent examination of the local need for the new service and also of whether the proposed service could be rendered by an existing facility. These particular provisions thus emphasize the Congressional desire to avoid waste through duplication and creation of unneeded facilities and recognition that the expansion of an existing facility could accomplish the same economic objective as the construction of a new one, i.e., the stimulation of the local economy.

Appellees insist that the service offered by Knox Pier, Inc. is simply that of a link between water and land transportation; and that, accordingly, it could not compete with appellant, which is engaged in land transportation. This position is based upon a very narrow--indeed erroneous -- view of the nature of the Rockland facility. Actually, the pier at Rockland, which will be used primarily as a receiving and transit center for water-transported grain for the feed-milling industry in Maine, and is the keystone of the competition inherent in the water carriage of grain from inland ports such as Toledo, Ohio, via the several waterways to the ocean and thence to Rockland, Maine. Only the pier allows the transit of grain to the processing plant at Rockland; only the pier permits Knox Pier, Inc., to compete with appellant for the grain traffic in Maine.

The significance of Knox Pier,Inc.'s competition to appellant is immediately evident when it is realized that practically all of the grain

coming into the State of Maine for use in the feed industry is transported on appellant's rail facilities. In 1965, for instance, 18,448 cars of animal and poultry feed and mill products moved over appellant's lines, and during the first nine months of 1966 a total of 11,636 cars moved. Along the Rockland Branch itself approximately 1,900 cars of grain and feed moved in 1965 to stations on the Branch, while in the first six months of 1966 about 935 cars moved to such stations. Obviously, the carriage of grain represents substantial income to appellant. As an example, appellant pointed out in its letter of September 2, 1964, to the Area Redevelopment Administration, that in 1963 carloads in animal and poultry feed and mill products represented 10.3 per cent of the entire tonnage carried on appellant's line and 7.5 percent of appellant's freight revenue. (See Defendants' Answer, Exhibit A pp. 9-11).

Any success Knox Pier, Inc. experiences in diverting grain from appellant's lines will have serious economic effects on appellant. If the Knox Pier, Inc. facility becomes functional as proposed, a substantial portion of the grain and feed products now moving by rail over the lines of Maine Central Railroad Company will be diverted to other modes of transportation, which will result in severe economic loss to Maine Central Railroad Company. Unfortunately, the economic effect would not stay only at grain products. Not only could Knox Pier, Inc.'s success result in the possible abandonment of the Rockland Branch, it could also adversely affect appellant's service to the paper industry in Maine, which requires a great number of high-grade box cars. Referring to Mr. Sumner Clark's affidavit, (J.A. p.32) appellant emphasizes his statement that:

> "Cars made empty by the receivers of grain and feed products are necessary and ideally suited for use by the paper industry to move its finished products. Without such an available car supply, it would be extremely difficult for Maine Central Railroad Company to find and provide a sufficient number of freight cars to meet the needs of its shippers and, accordingly, it would result in a substantial reduction in its revenues."

Mr. Clark's words highlight the wisdom of providing that a local regulatory body review projects that would compete with privately owned public utilities subject to regulation. In the present case the possible result of Knox Pier, Inc.'s success could be the crippling of appellant's ability to serve not only the poultry industry in Maine but also the highly important paper industry as well. Only a local regulatory body is equipped to make judgments about projects whose potential economic effect could be felt beyond the locality involved, raising questions of state-wide concern.

In light of the facts outlined above, it is difficult to understand appellees' claim that no competition would exist between appellant and the Rockland pier facility, or that the services rendered by the two facilities are different. Perhaps illustrative of appellees' frame of reference is Mr. Sharkey's statement that Section 2506(d), now Section 3141(d), would not apply to assistance for improved air transportation. (J. A. p. 23). Apparently appellees believe that only airlines compete with airlines, trucks with trucks and railroads with railroads. In this antiquated view, modes of carriage are distinct and compartmentalized, and financial aid can never be questioned unless a project fits neatly into the compartment the protestant has been assigned by appellees. Of course, to give this administrative system any credence

required that economic reality, and, indeed, the Congressional purpose, be completely ignored and, indeed, distorted to fit the preconception of the administrators. Thus, appellees can consider the pier as not involved in transportation, even though under the water-carrier provisions of the Interstate Commerce Act, if they applied in this case, the pier facility at Rockland would be considered as a "transportation facility" as defined in 49 U.S.S. §902(g).

That the foregoing demonstrates the existence of competition is beyond question. In Simplicity Pattern Co. v. FTC, 103 U.S. App. D. C. 373 258 F.2d 673 (1958), rev'd on other grounds, 360 U.S. 55 (1959), the court found that competition existed, for purposes of the antitrust laws, between two retail concerns operating in the same cities, often in the same shopping center, often side by side, which purchased the same product from appellant at the same price and sold it to substantially the same segment of the public at identical prices, notwithstanding the fact that one was operated for profit and the other was not. See 103 U.S. App. D.C. 373, 377-78, 258 F.2d at 677-78.

Similarly, too, in Esso Standard Oil Co. v. Secators, Inc., 246 F.2d 17 (1st Cir. 1957), competition was found to exist between a retailer and wholesaler of fuel oil where both supplied fuel for the operation of truck or cab fleets, even though the retailer supplied the normal incidental services and charged a higher price, while the wholesaler did not furnish incidentals and charged a lower price. The factor which the court found to be crucial is that both were striving for the business of selling gasoline directly to those who operate fleets of motor vehicles.

Appellant submits that this Court cannot agree with appellees' view of the lack of competition between the pier and the railroad. The pier at Rockland will be an integral part of a transportation system which would carry the same commodity from the same area of origin as appellant's railroad. In consequence, appellant and Knox Pier, Inc. are not economically dissimilar facilities but actually represent two methods of rendering the identical service, namely, the transportation of grain for the feed-milling industry of Maine.

CONCLUSION

On the basis of the foregoing, appellant submits that this Court must reverse the judgment of the District Court, and direct the entry of judgment for appellant.

Respectfully submitted,

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